Rödl & Partner

PHOTO-VOLTAICS IN POLAND 2023

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01 PHOTOVOLTAIC MARKET IN POLAND



Out of 41.4 GW of photovoltaic power plant capacity built in 2022, nearly 5 GW were built in Poland. This confirms the unwavering popularity of investment in solar energy in Poland. When regard to photovoltaic development, Poland is third only to Germany and Spain.

1. PHOTOVOLTAIC MARKET IN POLAND

DIFFICULTIES FOR THE INDUSTRY

It is worth stressing that despite the continued increase in capacity, 2022 also brought real difficulties for the industry. One of them was certainly the fact that prosumer micro-systems were no longer covered by the support scheme offering discounts, which was replaced with a much more “market-oriented” net billing system.

The outbreak of war in Ukraine also left a strong imprint on the industry. From a solar energy perspective, it primarily led to delays in the investment and construction process, rapid increases in equipment prices and significant problems in obtaining financing for further projects from investment funds.

The year 2022 also faced deepening difficulties of connecting PV system to the grid.
As the grid has become vulnerable to overloads, more and more applicants are being refused connection of their RES installations to the grid. This means that projects with connection conditions are now at a premium.

FUTURE PROSPECTS

Despite the significant difficulties mentioned above, the photovoltaic market in Poland develops rapidly. The President of the Energy Regulatory Office has said that RES capacity of 52 GW is to be connected to the grid by 2030, which is expected to produce enough electricity to cover more than 50 per cent of Poland's electricity needs. In this scenario, PV capacity in 2030 is estimated at 35.5 GW (currently around 12 GW), which is to account for 68.9 per cent of Poland's planned total RES capacity.

However, such ambitious goals will require significant investment in grid infrastructure. In this context, the expected disbursements from the National Recovery Plan, of which as much as 42.7 per cent are to be earmarked for climate targets and energy transition, should prove crucial. Increasing expenditure on grid expansion is also likely to be factored into new distribution tariffs.

NEW POWER PRODUCTION AND SALE MODELS

The future development of the photovoltaic market in Poland also brings new models for the generation and sale of renewable energy. An example can be the growing interest of project developers in so-called "cable pooling", which allows complementary renewable energy systems – e.g. wind and photovoltaic plants – to share a grid connection. This solution may benefit both the investor, who adds an additional installation using the previously obtained connection capacity, and the grid operator, who gets an installation with a much more sustainable level of energy production.

Another solution that could boost the dynamics of market development would be the direct lines in Poland, i.e. grid sections operating outside the National Power System that directly connect energy producers with end consumers. This would allow renewable energy sources to develop regardless of the available grid connection capacity, which translates into energy diversification of enterprises.

The potential of both cable pooling and direct lines is hampered by the current legislative environment. Draft amendments to address this problem have been prepared by the Ministry of Climate and Environment but so far have not been voted on. Their unblocking in 2023 would certainly permanently improve the conditions for investment in renewable energy sources in Poland.

Finally, energy storage and hydrogen catalysts cannot be overlooked when talking about changes in new forms of photovoltaic energy production and sales.
In this particular area, last year brought some positive legislative changes – amendments to the energy law enabling the development of solar energy as well.

2023 – CONTINUINED GROWTH OF PHOTOVOLTAICS?

When assessing the prospects for the photovoltaic market in Poland, the energy crisis caused by the limited availability of raw materials that used to be imported from Russia should also be addressed. Many enterprises have found the energy independence based on renewable energy sources to be a value which enables real savings.

From the perspective of enterprises sourcing energy from the Polish Power Exchange, in the face of high and unstable prices, investment in photovoltaic power plants still appears to be a sensible option for energy diversification.

This is particularly evident in the growing popularity of large-scale solar installations mounted on roofs of buildings or in their immediate vicinity.

Rooftop systems are not necessarily micro-systems – the largest power plants of that kind reach several megawatts. Also part of energy diversification of enterprises are power purchase agreements (PPAs), which are more and more popular.

The above outlined factors make the Polish photovoltaic market in 2023 worth looking at with attention and interest. Despite all the described difficulties, Poland is still one of the largest PV plant sites in Europe. The initial photovoltaic boom of 2018-2021 is, as a matter of fact, behind us, but in 2023, the solar energy market presents itself as much more mature, with larger and more stable players. It is a reliable market for financial institutions, and the projects being implemented are more and more often large-scale photovoltaic power plants with a capacity of several, several dozen or even several hundred megawatts, providing full-scale support to the National Electricity System.

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2. DEVELOPMENT OF A PHOTOVOLTAIC POWER PLANT PROJECT

2.1. SECURING A LEGAL INTEREST IN A REAL PROPERTY FOR A PHOTOVOLTAIC POWER PLANT

SECURING A LEGAL INTEREST IN A REAL PROPERTY FOR A PRODUCTION FACILITY

A crucial aspect of developing a PV project is to secure a legal interest in the land on which the PV plant is to be sited. In practice, land is usually leased.

OBJECT OF LEASE

The physical characteristics of land for a PV plant are not really the focus of this study. However, some of them determine the legal feasibility of the project. In practice, PV plants are developed either on non-agricultural land (wasteland, post-industrial areas) or on agricultural land. Construction projects on agricultural land are generally carried out on soils of class IV–VI. Fertile soils of class I-III are protected and cannot be built on. This is not an absolute rule. By way of exception, the law allows using soils of class I-III, which *de lege lata* requires that their non-agricultural use is permitted in a local spatial development plan and that the minister competent for rural development consents to it. Exceptions to this rule do exist but have no practical use in the development of large-scale PV farms. Similar restrictions apply to forest land.

MATERIAL TERMS OF LEASE

The contract authorising the developer, and at the same time the future energy producer, to use land should regulate the rights and obligations of the parties as precisely as possible. Matters not regulated by the contract will be governed by the statute. The key elements of the lease contract include its object, i.e. real property given over for use and enjoyment, and the rent. In view of the expenditure required for the construction of a RES facility, the sustainability of the lease relationship is also of paramount importance. A PV system does not necessarily need to be permanently attached to the land. However, as it is connected to the power distribution network, it can be very costly, and in many cases legally or technically unfeasible, to relocate an installation once it is operational.

TERM OF LEASE

In business dealings, contracts under which land is put to use are almost exclusively concluded for a fixed term not exceeding 30 years. This is most likely due to the fact that, according to the Civil Code, after the expiry of the 30-year term of a lease contract, it is treated by operation of law as a contract of indefinite duration. And contracts of indefinite duration may be terminated at any time with statutory or contractual notice periods.

TERMINATION OF LEASE

If the contract has been concluded for a fixed term, it may only be terminated in cases specified by law, such as rent arrears or sublease, and in cases specified in the contract by the parties. In practice, the parties expand or narrow the grounds for termination in order to safeguard their interests.

The law provides for exceptions to the above rule. Effective termination of a fixed-term contract is however possible in situations such as the purchase of real property by a third party.

The mandatory provisions of the Civil Code say that although the purchaser of a real property enters into the lease relationship, it may terminate it with statutory notice. An effective way to protect the lessee against such an undesirable situation is to authenticate the date of the lease contract concluded for a fixed term. Another condition is that the leased property is handed over to the lessee.
Similar protection is also offered by disclosing the fixed-term contract in the land and mortgage register, which requires the signatures of the lessee and lessor to be hand-written and notarised.

It may happen, however, that the lease contract is terminated by the new owner, which is an example of a systemic risk.
This is the case when real property is sold at auction organised by a court enforcement officer or the National Agricultural Support Centre acquires it by exercising its pre-emptive right.

RENT

Rent is an essential element of the lease relationship. In practice, there are two models for rent payment: either once the construction of the PV plant is complete or throughout the entire period from the start of the lease with the amount of rent depending on the stage of development of the project.
From a commercial point of view, the non-payment at the early stage of development of the PV project may seem reasonable, however, doubt may arise as to the legal nature of that unpaid contractual relationship. When it comes to the amount of rent, this is a commercial issue. Contracts providing for an adjustment of the rent amount have become common in business dealings, with the adjustment usually made on the basis of the consumer price index.

PLANT OWNERSHIP

According to the superficies solo cedit rule, buildings erected on a piece of land share that land's legal status. As for the PV installation, its attachment to land can be a contentious issue from a technical point of view.
It is a good practice to state in the lease contract that components of a PV plant erected on land are not part of that land, have been built for transient use and are owned only by the lessee. Property law is driven by the facts and circumstances and not by the will of the parties. However, case law practice shows that, in the event of a dispute, relevant contractual provisions are likely to influence the court's decision.

ASSIGNMENT OF LEASE

Assignment of lease basically means the transfer of all the rights and obligations under the lease contract. It is therefore a transfer of claims on the one hand and an assumption of debt on the other.
While the transfer of claims is generally possible without the consent of the debtor, the assumption of debt requires, as a rule, the consent of both the debtor and the creditor. This issue is of practical relevance both for trading in PV projects understood as a product and for obtaining financing for the construction of a PV plant. The contract should ensure that the lease can be assigned and regulate the mechanisms involved.

02 DEVELOPMENT OF A PHOTOVOLTAIC POWER PLANT PROJECT

NATURE OF LEASE

The concept of leasing (dzierżawa) land for photovoltaic and wind farms is widely used in business. It is however debatable whether, under Polish law, contracts concluded for the use of land for the construction and operation of RES installations qualify as lease as defined in the Civil Code.

The Supreme Court rejected this view in its judgment of 5 October 2012 (file no. IV CSK 244/12) saying that revenues from the sale of electricity generated by processing wind energy using wind turbines cannot be regarded as profits derived from land as defined in the Civil Code.
Given the obvious similarities in the operation of PV plants, it would be reasonable to assume that these conclusions also apply to PV plants that use solar radiation to generate electricity. Common courts have adopted a similar view. They consider contracts granting land for the construction of wind and photovoltaic power plants as innominate contracts to which the provisions on lease may apply. These considerations are not merely legal discourse. Depending on the specific case, they may be crucial in determining the actual rights and obligations of the parties to the contract.

SECURING THE LEGAL INTEREST IN A REAL PROPERTY FOR CONNECTION LOCATION

In the context of project implementation, just as important as securing the right to land for the construction and operation of the production unit itself is securing the legal interest to enable the lawful location of the connection between the generation source and the point of its connection to the power grid. In practice, in most cases, the connection will be located on a privately owned real property or on a real property with public road or internal road status.

PRIVATE REAL PROPERTY

The legal concept dedicated to regulating the right to locate transmission facilities is transmission easement. The real property may be encumbered with transmission easement, i.e. a right allowing an enterprise to use the encumbered property to a certain extent in accordance with the purpose of the facilities. Transmission easement is a limited property right that inures to the benefit of any owner of the real property on which transmission infrastructure is to be located. It must be established in the form of a notarial deed and disclosed in the land and mortgage register. It may be established for a fee or free of charge.

PUBLIC ROAD

For a public road, you need to obtain a permit from the competent road administrator, issued by means of an administrative decision, to locate technical infrastructure in a road area. Prior to starting construction, you also need to obtain a decision authorising the occupation of a road area in order to carry out construction work and to place technical infrastructure that is not related to road administration or road traffic needs. The decision authorising the occupation of a road area for the purpose of carrying out work is issued for a period ranging from a few to a few dozen days and entitles to physically enter the real property in order to carry out construction work on it. Importantly, fees are charged both for occupying the road area to carry out construction work and for placing technical infrastructure in the road area. In the first case it is a one-off fee, in the second case it is an annual fee.
It is legally impossible to establish a transmission easement on public roads.

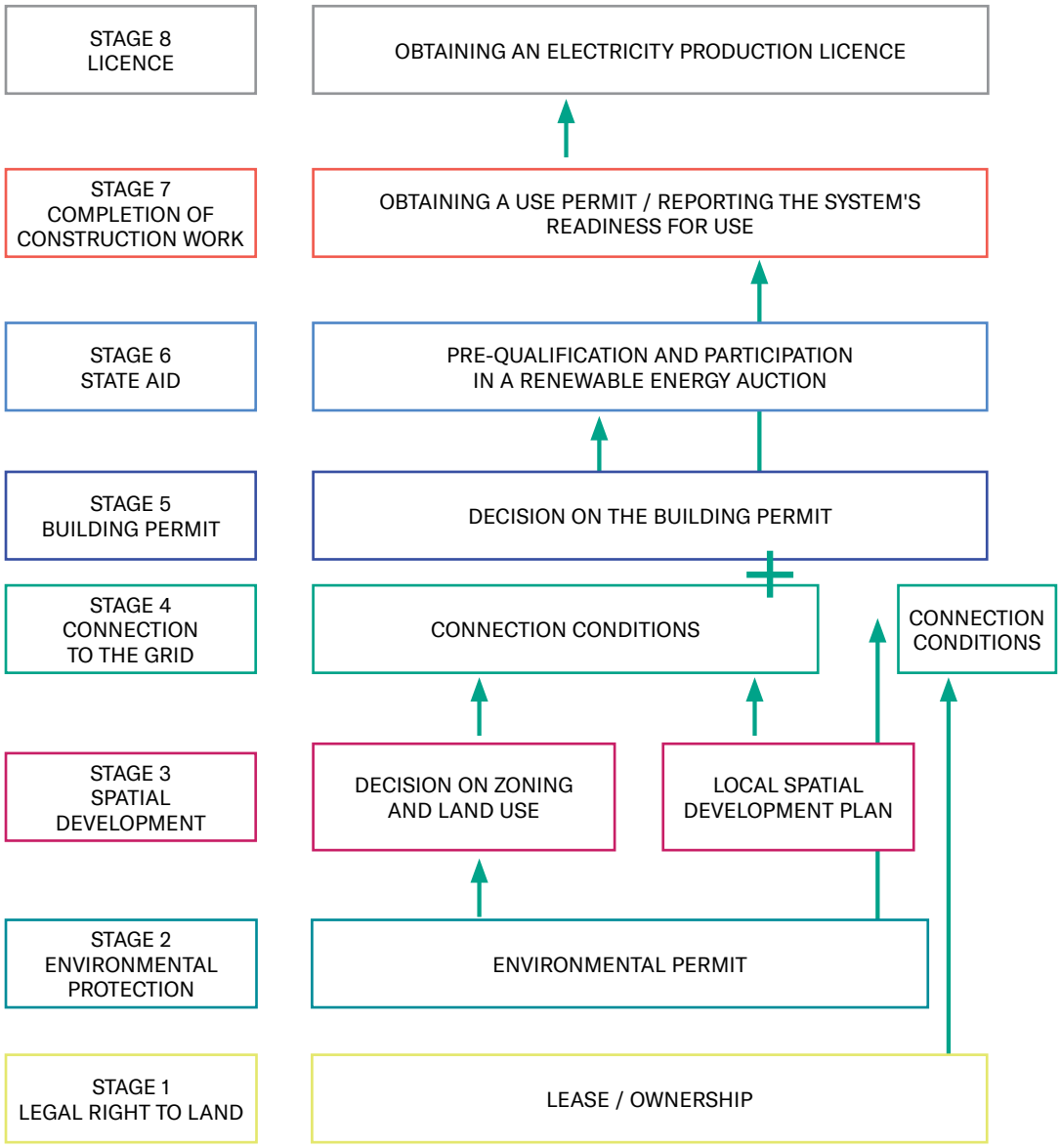
INTERNAL (ACCESS) ROAD

For municipal internal roads without public road status, the practice is not uniform.
The best legal solution is to establish a transmission easement on a real property.
However, this is not a common practice for municipalities. Municipalities are far more likely to issue written permits authorising the location of technical infrastructure on real property. These permits are similar in content to permits issued under the Public Roads Act but are not subject to the regime of that statute. From the investor's point of view, it is worthwhile to ensure that a property right is established or at least an agreement is concluded to establish a contractual relationship between the investor and the municipality.

2.2. INVESTMENT PROCESS

The PV plant investment and construction project is developed in stages. A model procedure provides for the completion of one stage before the next stage commences. These stages are called “milestones” in industry jargon.

Stages of the PV plant investment and construction process are shown in the diagram below



02 DEVELOPMENT OF A PHOTOVOLTAIC POWER PLANT PROJECT

ENVIRONMENTAL PERMIT FOR THE PROJECT

PV systems are used to produce green energy and as such may be considered as environmentally friendly. However, large-scale ground-mounted PV systems with a footprint exceeding 1 ha are classified as projects that may potentially affect the environment. Therefore, a permit listing environmental conditions for the project (environmental permit) will be the first stage of the investment and construction process. The exception are projects not exceeding 1 ha. If PV systems are to be developed in a nature conservation area or in buffer zones of protected areas as defined in the Nature Conservation Act, a PV plant with a footprint area of at least 0.5 ha is considered a project with potential environmental impact.
The body competent to issue the permit is the municipal authority – the head of municipality (wójt) or a city mayor.

As part of the procedure, the competent authority seeks opinions from cooperating authorities, i.e. the Regional Director for Environmental Protection, the bodies of the State Sanitary Inspectorate (as laid down in Article 78 of the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment), the body competent for water assessment matters and the director of the Maritime Office – only for projects developed in marine areas. In practice, the procedure is usually driven by the locally competent Regional Director for Environmental Protection, with whom the authority agrees the terms and conditions of the project.

As part of the procedure, the authority checks whether the project requires an environmental impact assessment. It is most likely necessary for multi-hectare projects or those located in protected areas. Please note that the environmental permit is not discretionary and the authority may disapprove the project only in specific cases specified in the statute. For a diagram showing the authority's decisions in the environmental permit procedure go to page 11.

As a rule, the environmental permit may be used at further stages of the investment process within 6 years from the date on which it becomes final.

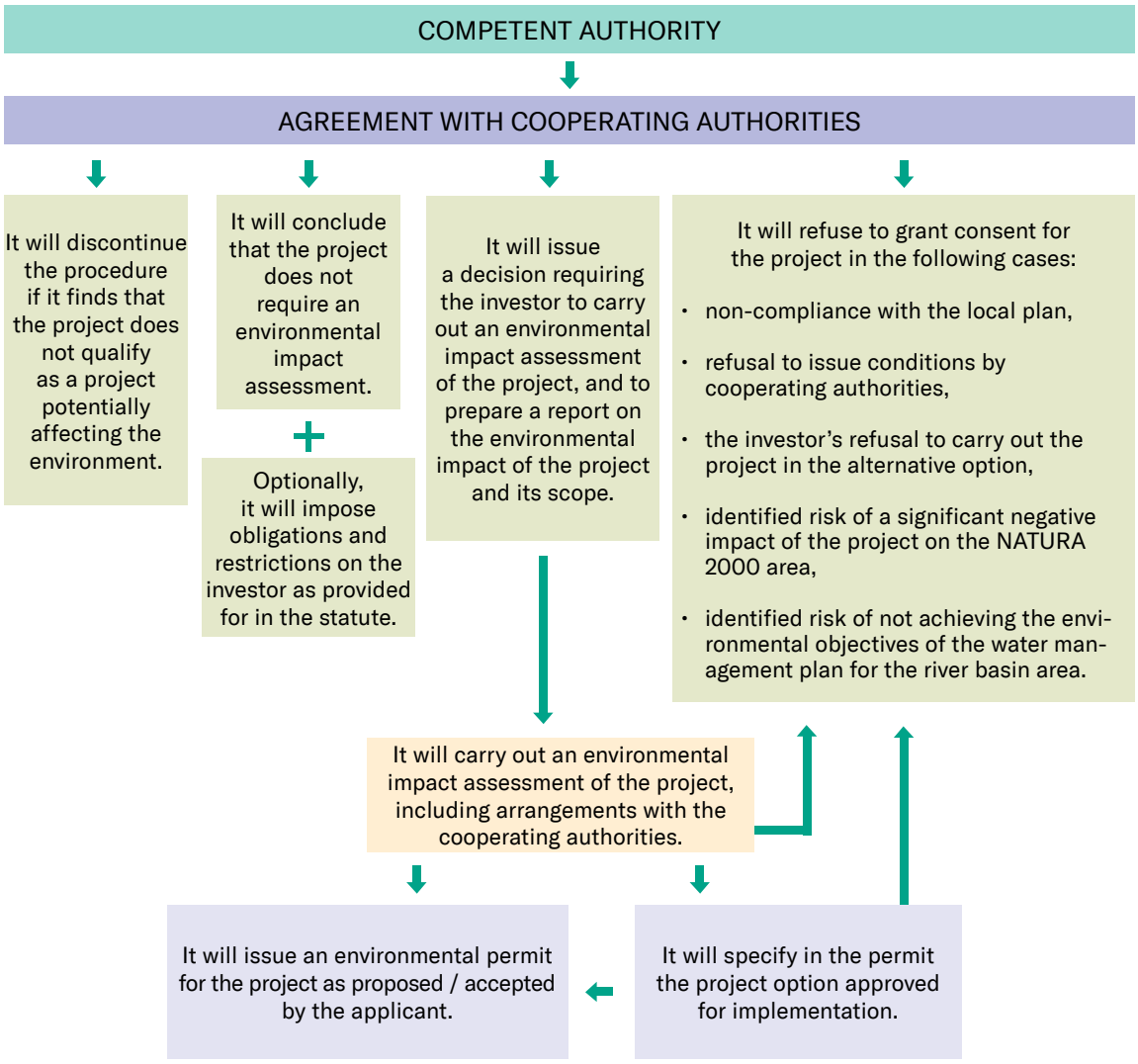
The applicant for the environmental permit for the selected land does not need to have the right to dispose of the land.

An important concept in the context of the environmental permit is salami slicing. This is the practice of artificially splitting one project requiring an environmental impact assessment into several smaller ones which, due to their parameters, do not require such an assessment.
This practice aims to circumvent the environmental impact assessment procedure and may be challenged by the authority.

SPATIAL DEVELOPMENT

Spatial development lies with the municipality. Municipalities adopt local development plans for the entire municipality or for selected areas of a municipality. If there is no local plan for an area, a zoning decision (*decyzja o warunkach zabudowy*) must be obtained.
A PV plant building permit may be issued and an investment project may be carried out in a given area provided that it is in line with the local plan or the zoning decision.

Possible decision of the competent authority in the environmental permit procedure



LOCAL SPATIAL DEVELOPMENT PLAN

Local spatial development plans (miejscowy plan zagospodarowania przestrzennego) are available for a relatively small area in Poland, in particular when it comes to rural or urban-rural municipalities.

The Spatial Planning and Development Act says that if a municipality is to designate areas for renewable energy systems with a capacity exceeding 500 kW, they should be located as specified in the zoning plan and the local plan, respectively. An exception applies to systems with an installed electrical capacity of up to 1000 kW located on agricultural land of class V, VI, VIz and wasteland, and to systems located on buildings regardless of their installed capacity. Such projects should be allowed irrespective of the requirements of the local plan.

RENEWABLE ENERGY SYSTEMS WITH AN INSTALLED ELECTRICAL CAPACITY OF MORE THAN 1,000 KW

This means in practice that the construction of generating facilities with an installed electrical capacity of more than 1,000 kW will absolutely need to be included in the zoning plan and consequently in the local spatial development plan. It is also important to note that due to its specific nature the investment process falls within the competence of local authorities. This means that legislation and its interpretation or practice may vary greatly across the country. Also case law shows differing views on the interpretation of legislation. For example, there is a legal dispute over the situation when the siting of renewable energy generating facilities has not been included in the zoning plan at all. There are two views on this matter. According to the first one, PV systems cannot be built in such a situation. According to the opposite view, the construction authority may not refuse a building permit in such a case.

SYSTEMS WITH AN INSTALLED ELECTRICAL CAPACITY OF UP TO 1,000 KW

The current regulation has been in force since 30 October 2021. Under previous, more restrictive laws, all RES systems with a capacity exceeding 100 kW required their siting to be determined in the zoning plan. The legislative change was intended to streamline the investment process for rooftop and small stand-alone installations. Unfortunately, due to the wording of the provisions introducing the amendment, this objective does not seem to have been achieved. As it seems, the current legislative framework applies only to areas for which the zoning plan was adopted or amended after the effective date of the statute.

DECISION ON ZONING AND LAND USE

If there is no local spatial development plan for an area where the project is to be developed, a zoning decision must be obtained. As part of the zoning decision procedure, the authority checks whether the requirements for issuing such a decision, as specified in the statute, are met. To obtain a zoning decision, it is first of all necessary to comply with the good neighbour rules. The authority carries out an urban planning analysis and checks whether the existing development makes it possible to determine the requirements for new development in terms of continuation of functions, parameters, features and indicators of development shape and land development. Certain investment projects such as railway lines, technical infrastructure and, under current legislation, also renewable energy systems are exempt from the requirement of good neighbour.

This legislation has been in force since the amendment of 19 July 2019 entered into force. Despite the seemingly clear wording of the provision, controversy has arisen in case law as to its application since the effective date of the amendment. Following the judgment of the Supreme Administrative Court of 9 December 2020 (file no. II OS K 3705/19), the amended provision should apply only to micro-systems with a capacity not exceeding 100 kW, or 500 kW. In its more recent judgments, the Supreme Administrative Court has retreated from this view. However, the controversial judgment has affected the industry. At the moment, the practice of interpreting the provision varies across municipalities. They may refuse issuing a zoning decision on the grounds that the requirement of good neighbour is not met.

In this context, it is worth mentioning that the zoning decision procedure requires a number of arrangements to be made. One of the approving authorities is the district governor's office (starostwo) as the competent authority for the protection of agricultural land. As already mentioned, agricultural land of class I-III does not play a real role in the industry and generally no zoning decision for a real property with such soils may be obtained.

PENDING LEGISLATIVE CHANGES

At the time of publication of this brochure, legislative work is underway to amend planning regulations. Significant changes are to address the issue of locating renewable energy projects.
Bill amending the Spatial Planning and Development Act and certain other acts
Work is currently underway to prepare a bill amending the Spatial Planning and Development Act and certain other acts.

The bill is to overhaul spatial development regulations. According to the current bill, a change in the spatial development of land involving the installation of renewable energy sources will be made on the basis of a local plan.

The current bill makes the following distinction:
- or installations located on agricultural land of class I-III, the rule should apply with no exception,
- for installations located on agricultural land of class IV, the rule should apply to installations with an installed electrical capacity of more than 150 kW or used for the power production business,
- on other land, the rule should apply to installations with an installed electrical capacity of more than 1,000 kW.

This means that in the future – except rooftop installations and small installations on the least fertile soils and wastelands – stand-alone PV plants will be sited on the basis of a local spatial development plan. At the same time, the statute is to introduce a simplified local plan and an Integrated Investment Plan to apply to RES generation sources and offer a facilitated planning procedure for the industry.

BILL AMENDING THE WIND FARM INVESTMENT ACT AND CERTAIN OTHER ACTS

Also the long-awaited bill amending the Wind Farm Investment Act and certain other acts is to become law in the near future. At the time of writing the Sejm passed the bill amending the Wind Farm Investment Act and certain other acts and the President signed it into law. The amended regulations are to relax the restrictive “10H rule” which prohibits construction of wind turbines at a distance shorter than 10 times the wind-turbine-height from nearest residential buildings. From the entry into force of the statute, the minimum permissible distance between wind turbines and residential buildings specified in the local plan should be 700 m.

2.3. CONNECTION TO THE GRID

Enabling the connection of a generation source to the electricity distribution network is a key step in the PV development process.

Before starting the PV investment process, it is worth checking whether the PV system can be connected to the distribution network.
Distribution and transmission system operators are obliged by law to make available information on the grid connection capacity available for generation sources.
Below you will find the links under which leading energy providers publish information about the connection status:

Energy provider	Link
ENERGA Operator S.A.	https://energa-operator.pl/uslugi/przylaczenie-do-sieci/informacje-o-stanie-przylaczen
TAURON Dystrybucja S.A.	https://www.tauron-dystrybucja.pl/przylaczenie-do-sieci/dostepne-moce/dla-wytworcow1 https://www.tauron-dystrybucja.pl/przylaczenie-do-sieci/dostepne-moce/podmioty-ubiegajace-sie
ENEA Operator sp. z o.o.	https://www.operator.enea.pl/przylaczeniedosieci/Informacje%20o%20przy%C5%82%C4%85czeniach
PGE Dystrybucja S.A.	https://pgedystrybucja.pl/przylaczenia/procedury-przylaczeniowe/Informacje-o-dostepnych-mocach-przylaczeniowych https://pgedystrybucja.pl/przylaczenia/procedury-przylaczeniowe/Informacje-o-podmiotach-ubiegajacych-sie-o-przylaczenie-do-sieci-powyzej-1kV
Polskie Sieci Elektroenergetyczne S.A.	https://www.pse.pl/obszary-dzialalnosci/krajowy-system-elektroenergetyczny/informacja-o-dostepnosci-mocy-przylaczeniowej https://www.pse.pl/obszary-dzialalnosci/krajowy-system-elektroenergetyczny/wykaz-podmiotow-ubiegajacych-sie-o-przylaczenie

The grid connection procedure consists of two formal steps:
- obtaining grid connection conditions;
- concluding and executing the connection agreement;

GRID CONNECTION CONDITIONS

This document issued by the operator confirms that a generation source can be connected to the electricity distribution network and specifies technical details for such connection.
The operator is bound to sign a connection agreement with the producer within 24 months of issue of the connection conditions. The connection conditions thus temporarily reserve space in the grid for a PV project. If the producer fails to conclude a connection agreement within 24 months, the connection conditions become invalid.

To obtain the grid connection conditions, an advance payment of 30 zloty for each kilowatt of connection capacity specified in the application for connection conditions is required. However, the advance payment cannot be more than the amount of the grid connection fee set by the operator and more than 3 million zloty. The investor has to make the advance payment within 14 days of submitting the application for connection conditions.

CONNECTION AGREEMENT

Under a connection agreement, the parties – the operator and the producer – undertake to connect the PV system to the grid. To do this, both parties undertake to carry out work to connect the generation source to the distribution network. In practice, the main obligation of the operator under the connection agreement is to revamp the local network, transmission facilities and other technical infrastructure so that the energy produced by the plant can be received. In turn, the main obligation of the energy producer is to build the generation source and the electricity connection.

Renewable energy systems have privileged access to the grid. Provided that there are technical and economic conditions for that, the grid operator is obliged to conclude a connection agreement with a renewable energy system before other systems. Moreover, the lawmakers have expressed their preference for connecting renewable energy systems to the grid by reducing the connection fee for such systems to only half of the actual connection costs incurred by the operator.

LEGISLATIVE CHANGES INTRODUCED IN 2022

The fact is that developers face the growing number of refusals to connect to the grid as there are no technical or economic conditions for connection.
In 2022, the lawmakers imposed new obligations on power companies to meet the needs of energy producers.

If a power company refuses to conclude a grid connection agreement or to first connect a renewable energy system, it must immediately notify the President of the Energy Regulatory Office and the applicant of the refusal in writing, stating the reasons for it.

If the refusal is for economic reasons, the power company should provide the estimated amount of the connection fee, along with information that the applicant may request explanation of the method used to calculate that fee.

In addition, network sections to connect the system may be constructed and expanded by the applicant for the connection, in consultation with the power company.

2.4. BUILDING PERMIT

The final building permit is required to start construction work. Construction work should commence within 3 years of obtaining the final building permit. If the project is developed on land classified as agricultural land, such land should be excluded from agricultural production before a building permit is applied for. The requirement does not apply to agricultural land of classes IV-VI developed from soils of mineral origin.

These soils are most common, so in most cases it will not be necessary to exclude such land from agricultural production. However, this issue should be carefully reviewed. Location of the project on class IV-VI soils of organic origin requires their exclusion from agricultural production and payment of one-off and annual fees, where the amount of the fee for excluding one hectare of class IV soil of organic origin may be as high as 204,015 zloty.

According to the prevailing view, the construction design of a production unit does not need to include the connection. The connection may be constructed on the basis of a notification.

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2.5. LICENCE

LICENCE

The last step before selling electricity from the PV system is to obtain a business licence in this respect. Depending on the size of the system, it is either an entry in the register of small-scale energy producers or a licence to produce electricity from renewable sources. The licence is granted by the President of the Energy Regulatory Office. The stamp duty for both an entry in the register and an application for a licence is 616 zloty. Importantly, after obtaining the licence, the energy producer is required to pay an annual licence fee, which is calculated on the basis of revenues generated by the RES system. RES systems with a capacity of up to 5 MW are exempt from that fee.

Type of PV system	Authorisation	Requirements
Micro-system (up to 50 kW)	No authorisation required	None
Small-scale system (up to 1 MW)	Entry in the register of small-scale energy producers	Application for entry including the required statements. Less formal procedure. The President of ERO is obliged to make an entry in the register of small-scale energy producers within 21 days of receiving the application for entry. If the producer receives no response to the application for 28 days, it can start operations without an entry.
Large-scale system (more than 1 MW)	Electricity production licence	Extended procedure. The Energy Regulatory Office examines the technical documentation of the PV system and the legal and financial standing of an enterprise. Duration of procedure – up to two months of submitting a complete application. In practice, however, the procedure often takes longer.

Good to know

Even before obtaining the licence, the energy producer is entitled to sell the electricity produced during the commissioning phase, that is during trials and tests allowing for final acceptance of the system. Article 42(5) of the RES Act says that energy produced during the commissioning phase is purchased by the obliged seller (sprzedawca zobowiązany) for no longer than 90 days.

The time needed to process the application for an electricity production licence can be shortened by obtaining a licence promise earlier.

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3. STATE AID FOR RES PROJECTS

3.1. POLISH INVESTMENT ZONE

The Polish Investment Zone (PIZ) is an instrument through which enterprises investing in Poland may obtain a tax relief for a new project. It was introduced in May 2018 by the Act on Supporting New Investments and until the end of 2026, it has been and will be operating along with tax exemptions for investors operating in Special Economic Zones (SEZs).
Support for new projects under the PIZ may be granted throughout Poland and not, as before, only in areas within SEZ. As a rule, support is provided regardless of the size of the enterprise both in the industrial sector and across various services.

Support is granted in the form of CIT or PIT exemption in connection with the development of a new investment project, and tax relief is granted under regional investment aid.

The income tax exemption limit is calculated as a percentage of:
- new investment costs (capital expenditure incurred) – as is usual in the industrial sector, or
- 2-year cost of hiring new staff – modern services sector.

The percentage of state aid (aid intensity) depends on the size of the enterprise and the selected location. In some regions of Poland, the investor can recover in this way up to 70% of the new investment costs incurred (so-called eligible expenses).

Region or sub-region	Enterprise – status			The exemption limit calculated based on
	Micro and small	Średnie	Duże	
provinces: Lubelskie, Podkarpackie, Świętokrzyskie, Podlaskie, Warmińsko-Mazurskie, the Siedlce sub-region, from 16/02/2023 also the Oświęcim sub-region (in the Małopolskie Province) and selected municipalities in the Piotrków and Sieradz regions of the Łódzkie Province	Medium	60%	50%	Investment costs or 2-year costs of newly hired employees
provinces: Zachodniopomorskie, Lubuskie, Kujawsko-Pomorskie, Mazowieckie regional (except for the Warsaw capital region and Siedlce sub-region), Łódzkie, Opolskie, Małopolskie and from 16/02/2023 also 7 sub-regions of the Śląskie province (sub-regions: Katowice, Sosnowiec, Tychy, Bielsko-Biała, Rybnik, Bytom, Gliwice)	Large	50%	40%	
eastern Warsaw sub-region (municipalities: Dąbrówka, Dobre, Jadów, Kałuszyn, Kołbiel, Latowicz, Mrozy, Osieck, Serock, Siennica, Sobienie-Jeziory, Strachówka and Tłuszcz)	55%	45%	35%	
provinces: Pomorskie and Śląskie (subject to higher thresholds for certain sub-regions)	50%	40%	30%	
provinces: Wielkopolskie and Dolnośląskie (except for Poznań, Wrocław and the Poznań sub-region) and part of the western Warsaw sub-region (municipalities: Baranów, Błonie, Góra Kalwaria, Grodzisk Mazowiecki, Jaktorów, Kampinos, Leoncin, Leszno, Nasielsk, Prażmów, Tarczyn, Zakroczym and Żabia Wola)	45%	35%	25%	
Poznań, Wrocław and Poznań sub-region	30%	30%	20%	
capital city of Warsaw and neighbouring districts (municipalities: Izabelin, Łomianki, Ożarów Mazowiecki, Stare Babice; district: Legionowo, Mińsk Mazowiecki, Otwock, Wołomin, Grodzisk Mazowiecki – municipalities: Milanówek and Podkowa Leśna, Nowy Dwór, Piaseczno, Pruszków)	0%			

This means that the higher the eligible expenses incurred by the enterprise for the new investment project, the higher the potential tax exemption limit. Please also note, however, that to obtain support, an enterprise must incur the required minimum capital expenditure – from 200 thousand zloty to 100 million zloty (depending on its size, sector: industry vs services and the region in which it will locate its new project).

ENERGY INFRASTRUCTURE AND STATE AID IN THE PIZ

According to the PIZ Act, a state aid decision (decyzja o wsparciu) may not be issued for an activity:

a) for which a licence is required under the Energy Act, and
b) in the cases listed in Article 13 of Commission Regulation (EU) No 651/2014.

The above-mentioned provision of Regulation No 651 says that regional aid does not apply, among other things, to the energy generation and distribution sector and related infrastructure, except for regional investment aid in the outermost regions and regional operating aid.

This means that, as a rule, state aid in the form of a future income tax exemption for an enterprise operating within the Polish Investment Zone is not granted to businesses that are professionally involved in the production and distribution of energy, including energy from RES. So what about those businesses that are also considering investing in RES systems for captive use?

RES SYSTEMS FOR CAPTIVE USE VS PIZ

A new trend can be seen among PIZ investors that instal photovoltaic panels (and/or heat pumps), which is in line with the above-mentioned Green Deal strategy. But here a doubt arises as to whether such an expense can be included in the eligible expenses incurred by a PIZ investor for its new investment project and thus increase the allowable future CIT exemption?

Please note that both the European Commission and the Polish Office for Competition and Consumer Protection have repeatedly stated that, under certain conditions, part of the expenses related to energy generation may qualify as eligible costs for projects using regional investment aid. In its letter of 29 October 2018, the EC indicated such a possibility, provided that the following conditions are met:

1) the primary purpose of the entire project is not energy generation (checking whether most of the costs are not related to energy generation);
2) the energy generation capacity should be suited to the applicant's needs (ex-ante checking whether the 80/20 rule has been observed, i.e. a maximum of 20% of the energy planned to be generated may be sold);
3) eligible costs for the following energy sources: renewable energy sources (RES) or high-efficiency cogeneration (but not, for example, diesel power).

To sum up, in the context of the EU regulations and, above all, the explanations provided by the European Commission, the Polish Office for Competition and Consumer Protection and the Ministry of Development and Technology[1], the cost of a PV system could potentially be the cost of new investment eligible for state aid. In practice, however, the issue was not clear-cut.

[1] Response of the Ministry of Development and Technology to parliamentary question no. 24655

03 STATE AID FOR RES PROJECTS

LEGAL STATUS UNTIL 31 DECEMBER 2022

In 2022, a new qualitative criterion for RES was added to the PIZ Regulation 1:
"A new investment in renewable energy sources with a connection capacity at least 15 per cent higher than that under the grid connection agreement, which would qualify for state aid in accordance with the rules on state aid in the energy sector, provided that the costs incurred for such a RES project are not included in the eligible costs of the investment project carried out under the state aid decision and the project does not benefit from other forms of support".

This criterion was not mandatory but if it was selected by the investor during the application procedure, it had to be met. Also a new application form for a State Aid Decision was developed, containing a mandatory statement to be made by the enterprise that "the declared eligible investment costs (regional aid) (...) are exclusive of investment costs for energy production and distribution and for related infrastructure".

Thus, as the law stood until the end of 2022, the investor could have chosen to meet such a criterion at the stage of applying for support (and thus to incur such expenses as part of its investment project), but in practice, in the context of making the above mandatory statement, the investor was unable to include those expenses in the eligible costs and thus increase the available tax exemption.
However, in practice, certain Special Economic Zones permitted to treat expenses on RES for captive use as eligible costs of a new investment project, provided that the conditions set out by the EC were met.

LEGAL STATUS FROM 1 JANUARY 2023.

The new PIZ Regulation in effect from 2023 2 relaxes the conditions of the discussed qualitative criterion relating to RES, reading now as follows: "A new investment in renewable energy sources with a capacity to provide at least 15% of average annual electricity consumption at the facility".

In addition, the new application form for a State Aid Decision still includes a mandatory statement to be made by the enterprise that the declared eligible investment costs are exclusive of costs for energy production and distribution. The application form says further that that mandatory statement does not apply to costs of energy production, provided that the above three conditions set out by the European Commission are jointly met. This means that in the context of the State Aid Decision (granting state aid in the form of future CIT and/or PIT exemption), the investor may incur expenses for RES systems or heat pumps and treat them as costs eligible for regional aid. In other words, if, as part of its new project, the investor also plans to produce energy for its business, such expenses will qualify for available state aid, including a possible income tax exemption.

[1] Regulation of the Council of Ministers of 28 August 2018 on state aid granted to certain enterprises for development of new investment projects.
[2] Regulation of the Council of Ministers of 27 December 2022 on state aid granted to certain enterprises for development of new investment projects.

3.2. ENERGY INFRASTRUCTURE AND THE GREEN DEAL

In line with the Green Deal strategy, the European Union aims to achieve climate neutrality by 2050 and to collectively reduce net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels. These targets are enshrined, among others, in Regulation (EU) 2021/1119 of the European Parliament and of the Council "European Climate Law". They have therefore become a legally binding obligation on all Member States. The above target requires, among other things, that the share of energy from renewable sources and the energy efficiency of residential and industrial buildings should be increased.

Also worth mentioning is the EC's initiative such as the RE PowerEU Action Plan, including the EU Solar Strategy published in May 2022. The strategy is to double installed PV capacity by 2025 (up to 320 GW), while 600 GW is planned to be reached in 2030.

Under the solar strategy, solar systems (PV panels or solar collectors) will be mandatory on the roofs of all:

- new commercial and public buildings with a usable area of more than 250 m2 – from 2026,
- existing commercial and public buildings with a usable area of more than 250 m2 – from 2027,
- residential buildings – from 2029

With this in mind, more and more enterprises starting a new investment are already including alternative energy sources in their projects.
And given the targets of the Green Deal, this will soon be a necessity.

3.3. FINANCIAL SUPPORT FOR RES PROJECTS FROM GRANTS AND SOFT LOANS

When planning future investments in renewable energy sources, you should consider the available and planned forms of state aid, both repayable and non-repayable.
Importantly, when applying for state aid, you should remember to apply for it before starting the investment.

Currently, you can apply for loans on preferential terms for that type of projects. Part of the instalments may be forgiven once certain requirements are met.

In 2023, the first calls for proposals of the EU funding programmes for the period 2021-2027 were launched, including to finance RES-related parts of the projects. This type of non-repayable financial support, which involves reimbursing the enterprise for part of the costs incurred, can significantly boost investment projects, such as the installation of photovoltaic panels, energy recovery installations, cogeneration or obtaining heat from geothermal deposits.

MAGDALENA SZWARC, MAGDALENA SKUROWSKA

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4. BUSINESS MODELS FOR ENERGY PRODUCTION AND SALES – PHOTOVOLTAICS

The changes observed in the Polish solar energy market have led to the emergence of new business models for the production and sale of electricity from photovoltaic systems. This chapter briefly examines them.

Energy producers continue to be interested in renewable energy support schemes. For micro-systems, this is the newly launched net billing system, offering guaranteed purchase of energy from prosumer installations at the average market price. For larger installations, the most popular is still the auction system, which currently seems to be less and less attractive as there is a large difference between auction prices and market prices for energy.

Another important trend is the increasing share of corporate PPAs. Business must more and more often decide on whether disregard or voluntarily leave the auction support scheme.
The corporate PPAs are encouraged by increases in energy prices and the growing interest of end consumers in purchasing renewable energy. Purchasing energy under the PPA is simply becoming much more financially attractive than obtaining energy from conventional sources, where the energy price must also consider the obligation to purchase CO2 emission allowances. Please also note that demonstrating renewable energy consumption is increasingly becoming part of enterprises' CSR policies. And from the energy producers' perspective, an important driver for corporate PPAs is the growing confidence of banks and investment funds in this particular business model. Today, obtaining financing for the construction of a PV plant under a corporate PPA is much easier than just four or three years ago.

Rising energy costs are one of the reasons why large-scale PV systems are also increasingly being used as a supplementary power supply for production plants, storage and other facilities of that type. We can see investments involving the construction of large rooftop PV plants to serve the purpose of partially reducing energy consumption from the grid by businesses. In addition to typical investments involving the construction of PV plants by an interested enterprise, lease / rental of such plants is also becoming more common. A PV plant may also be combined with the accompanying energy storage system.

An interesting issue but still unheard of on the Polish market are energy communities, in particular energy clusters, energy cooperatives or collective prosumers.
Given the popularity of such forms of energy production abroad and the gradual improvement of the regulatory environment in Poland, the development of such projects may seem worthy of interest.

The prospects for investment in agrophotovoltaics are also increasingly interesting.
As you can see, more and more models allowing the use of solar energy are appearing on the Polish market. The market is highly flexible, which is worth bearing in mind when planning an investment.

4.1. RES AUCTIONS

Renewable energy auctions are the only support scheme currently in place for new photovoltaic power plants. It is based on two settlement mechanisms:

- a fixed guaranteed price (systems with an installed capacity of 500 kW or less): electricity from RES systems is sold at a fixed price set in the energy producer's bid submitted at the RES auction, the purchase of energy from the producer is guaranteed by a so-called obliged seller;
- contracts for difference: after winning the auction, energy producers are entitled to support which involves the renewable energy settlement operator paying the difference between the energy price contracted through the auction and the average market price.

Auctions are organised at least once a year by the President of the Energy Regulatory Office and are announced at least 30 days before their start. Participants in the auction submit bids for their RES installations via the Online Auction Platform. The auction uses the lowest price criterion until the volume of energy to be auctioned runs out.

REGISTRATION FOR AUCTION

Before bidding in an RES auction, an energy producer must be formally admitted to the auction. To this end, it must be assessed by the Energy Regulatory Office.
The procedure should be completed within 30 days of submitting a complete application.

In order to prequalify for the auction, the producer should meet the following requirements:

- demonstrate that it has a legal interest in the real property on which the PV plant will be sited;
- have the connection conditions or a grid connection agreement for the RES system design to be submitted to auction;
- obtain a final and valid building permit for the planned RES system.

It should also present a financial and work schedule for the project and a RES plant diagram showing the production facilities and the power output facilities. Bidding in the auction does not require a licence or an entry in the register of small-scale energy producers.

RES auctions are primarily addressed to systems at the design stage. It is much more difficult to enrol in the system for power plants that have already started to produce and sell energy – no supplementary call is organised.
If the above documents are assessed positively, the President of the Energy Regulatory Office issues a certificate of admission to the auction.

SUBMISSION OF A BID

After obtaining a certificate of admission to the auction, the energy producer is required to pay a deposit in order to submit a bid.
It amounts to 60 zloty for each 1 kW of installed electrical capacity of the RES system submitted to auction and may be paid in cash or as a bank guarantee.
The deposit is returned to the energy producer's account if the bid submitted by the producer does not win the RES auction or at its request – e.g. it withdraws from the auction.

If the energy producer wins the auction, the deposit is only returned once the sale of energy from the installation has commenced within the statutory period.

04 BUSINESS MODELS FOR ENERGY PRODUCTION AND SALES – PHOTOVOLTAICS

OUTCOME OF THE AUCTION

As already mentioned, auctions are carried out via the Online Auction Platform provided by the Energy Regulatory Office. Thus, submitting a bid at an auction requires an electronic signature by the board member representing the energy producer.

Auctions are held separately for various technologies (koszyki technologiczne), most often for installations with a capacity of 1 MW or less and for larger installations. Interestingly, PV installations and wind installations count as one technology.

In its auction bid, the energy producer must specify the price and the amount of energy it undertakes to produce in the individual years falling within the 15-year auction support period. The energy price may not exceed the reference (maximum) price as announced in a regulation of the Minister of Climate. An energy producer may only submit one bid per RES installation, and its terms remain confidential to other auction participants.

The outcome of the auction is published by the President of the Energy Regulatory Office. You can also see the status of the auction bid on the user's profile on the Online Auction Platform.

WHAT HAPPENS AFTER THE AUCTION?

The auction winner is given a statutory deadline for the first production and sale of energy from the installation. For PV installations bidding in auctions until 2022, it was 24 months from the end of the auction session. For installations submitted to auction from 2023 onwards, the deadline has been extended to 33 months. During this period, the energy producer is required to build the RES installation, connect it to the grid, obtain a licence (or enter it in the register of small-scale energy producers) and properly commission the installation.

If the deadline for the first sale is missed, the installation is excluded from the auction system and cannot participate in auctions for three years. The deposit paid by the energy producer is also forfeited. Such a severe penalty is intended to prevent energy producers from delaying the investment process. Please note, however, that Polish law allows an extension of that deadline in certain cases.

AUCTION SETTLEMENT MECHANISM

For RES installations with a capacity of 500 kW or less, the situation seems simple – the energy produced by the energy producer is purchased by the obliged seller at a fixed price resulting from the auction bid.

Much more complex is the settlement mechanism for larger installations. In this case, the difference between the auction price (adjusted for inflation) and the market price of electricity is calculated.
If the bid price is higher – the equivalent of the difference (the so-called negative balance) is paid to the energy producer by the Settlement Administrator (Zarządca Rozliczeń S.A.).
This ensures that the price of electricity specified in the auction bid is paid in the long term.

It is much less favourable for the energy producer if the bid price is lower than the market price.
We are then talking about the so-called positive balance, which, if not set off against a future negative balance, must be reimbursed by the energy producer. As a side note, that is why auction systems have recently received limited attention. Please remember, however, that the auction system, by securing revenues from the sale of electricity in the long term, is advantageous to energy producers, particularly appreciated in the context of securing project financing from banks.

4.2. POWER PURCHASE AGREEMENTS (PPAS)

PPA (*power purchase agreement*) is the term used to describe contracts for the sale of renewable electricity, directly by the energy producer.
In practice, the most common types of such agreements include:

- an agreement between an energy producer and a trading company that buys energy from the producer outside the regulated market;
- an agreement between an energy producer and an end consumer who takes the energy to power up its own facility (*corporate PPA*).

Interest in this type of contracts is on currently on the rise. The reasons are similar to those in other EU countries: lower costs of generating energy from RES as a result of ever-larger power plants being constructed, more expensive energy from conventional sources, increasing environmental awareness among buyers and modified purchasing policies of enterprises.

PPAs are often seen as an alternative to renewable energy auctions, which are no longer seen as the sole basis for making a project credible to a lending bank or an investment fund. It must be made clear, however, that the legislation does not preclude the conclusion of a PPA and the simultaneous participation in the auction support scheme by the energy producer.

Specific clauses on the amount of energy to be supplied to be included in the PPA:

- *pay as produced* clause – the parties agree to sell the entire energy that has been produced by the system in a given time period, do not set a fixed amount of energy that must be delivered to the end consumer each month – this clause is crucial given the weather-dependent nature of photovoltaic energy production;
- *pay as consumed* clause – a much less frequently used clause under which the energy producer must provide the amount of energy corresponding to the current energy demand of the consumer (in such a case trade balancing is of key importance);
- *baseload* clause – the energy producer is obliged to supply a predetermined, specific amount of energy, irrespective of the energy production conditions; if it fails to supply the required amount, it should pay for the additional energy acquired by the consumer on the market.

An interesting type of PPAs that exists on the Polish energy market is a Virtual PPA.
Unlike the above-mentioned types, it is not about the physical delivery of energy to the consumer. It is merely a type of a contract for difference to protect the contracting parties against energy price fluctuations. Under a Virtual PPA, the parties agree to pay the difference between the contracted strike price and the contracted electricity price quoted on the market. If the market price of energy is higher than the contractually agreed strike price, the excess is paid by the energy producer to the end consumer. Otherwise, the consumer is obliged to pay the excess. This allows both parties to fix the price of renewable electricity at the agreed level in the long term. The Virtual PPA is also often associated with the purchase of a guarantee of origin by the energy consumer.

When deciding to conclude a PPA, you also need to be mindful of the caps on revenues from the sale of renewable energy, as introduced in December 2022. They are valid until the end of 2023 and set a maximum price cap that can be obtained by the energy producer from the sale of renewable electricity. If such a cap is exceeded, the energy producer must pay the excess to the so-called Price Difference Payment Fund (*Fundusz Wypłaty Różnicy Ceny*). At the time of this publication, it is unclear whether the price caps will be extended.

04 BUSINESS MODELS FOR ENERGY PRODUCTION AND SALES – PHOTOVOLTAICS

4.3. CAPTIVE USE OF PHOTOVOLTAIC ENERGY, LEASE / RENTAL OF PHOTOVOLTAIC SYSTEMS

An increasingly common business model is to build a PV plant on the roof and produce energy for captive use, which, however, requires the plant to be connected to the grid beforehand. This solution reduces the amount of electricity purchased on the market. It seems particularly attractive to enterprises with stable consumption, which consume the energy produced on an ongoing basis. If they have surplus energy that is not used for day-to-day operations, they can sell it to a trading company.

The self-consumption of energy sometimes involves leasing / renting a PV installation.
In this case, the roof owner that is also the energy consumer, leases a PV installation, which is owned by a power company. In this way, it gains access to the energy produced while repaying the value of the PV installation in instalments. When shaping the lease / rental contract for a PV installation, we recommend extreme caution when setting out the payment terms. According to the interpretations of the Energy Regulatory Office, the amount of rent from the lease of a PV installation cannot be the clear equivalent of the sale price of electricity.

4.4. SALE OF A GUARANTEE OF ORIGIN

The sale of a guarantee of origin can generate additional income for energy producers on top of sold electricity.

A guarantee of origin certifies to the end consumer that a unit of energy has been produced in a RES installation, thereby reducing greenhouse gas emissions.

An authority authorised to issue guarantees of origin is the President of ERO, on the basis of data provided by the distribution system operator or transmission system operator on whose area of operation the PV installation is connected. A guarantee of origin may be requested up to 30 days from the date of completion of production of the electricity covered by the request.

The guarantee of origin is issued within 30 days of the date on which the operator submits the guarantee of origin request to the President of ERO. The issued guarantees of origin are entered in a guarantee of origin register. A guarantee of origin is valid for 12 months from the date of completion of production of the energy for which the guarantee of origin is requested and is entered in the guarantee of origin register.

Then, the holder of the guarantee of origin, i.e. the energy producer or the purchaser of the guarantee of origin, may request the President of the Energy Regulatory Office to cancel it within 10 days of submitting the request. Only then, once it is cancelled, is a document issued confirming that the unit of energy covered by the guarantee of origin comes from renewable sources. This is basically the only evidence in the Polish system that the energy used by the consumer comes from renewable sources.

4.5. DIFFERENT USES OF PHOTOVOLTAIC SYSTEMS

PV plants can be used in different ways but their potential for use in combination with energy storage systems should be mentioned first.

In this respect, the following two solutions are available on the market:

- off-grid PV system with energy storage, where the electricity produced can be used on an ongoing basis or accumulated in energy storage – the main advantage of this solution is the owner's high energy autonomy;
- PV system with energy storage connected to the grid;
- so-called hybrid system, which shows much greater flexibility of operation.

Please note that recent amendments to the energy law have facilitated energy storage. The concept of a storage system operator has been introduced and the “double” charging of the stored energy with transmission fees (at the entry and exit of storage) has been discontinued.

Regulations have also been adapted to support hybrid systems.

A PV system combined with energy storage helps not only to save unused energy. Please note that an energy storage facility can join the so-called capacity market, where energy remains, against consideration, ready to be used in the event of increased energy demand (e.g. when the power system is overloaded). Storing energy also makes it possible to sell it at a better price when there is less energy available on the regulated market.

As for other different uses of PV plants, you should certainly take notice of the production of green hydrogen by feeding hydrogen catalysts. A bill regulating this area has been prepared by the Ministry of Climate and Environment but is still awaiting a vote in the Sejm.

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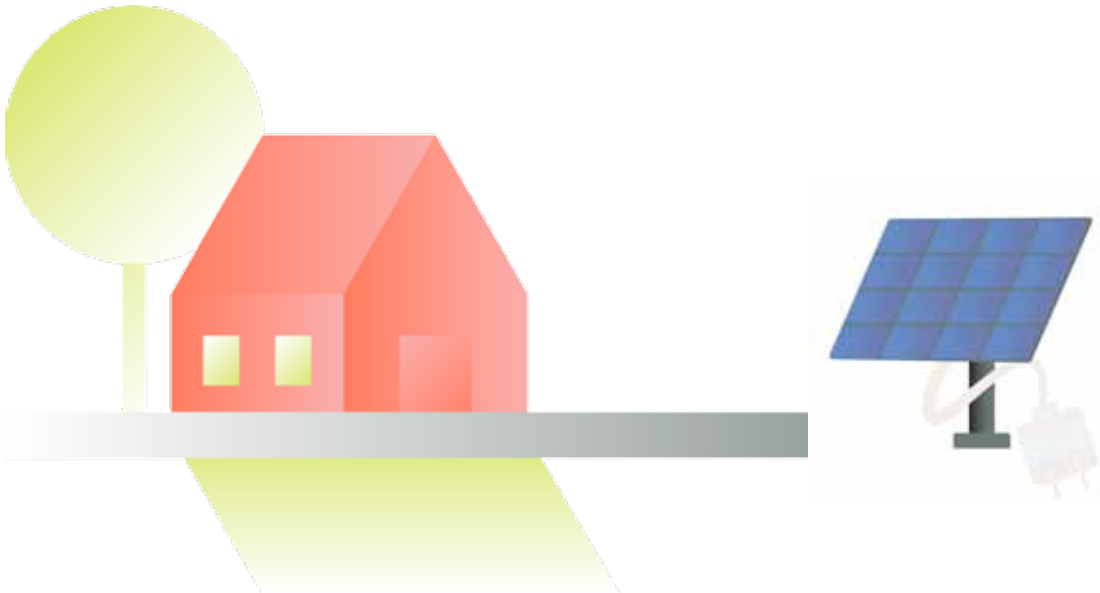

5. TAX IMPLICATIONS OF ASSET DEAL (SALE AND ACQUISITION OF PROJECTS) VS SHARE DEAL (SALE OF AND ACQUISITION OF COMPANIES)

5.1. ASSET DEAL

VAT

Please note that tax implications of transactions involving the acquisition of PV projects may vary depending on the nature of the transaction. However, the acquisition of projects will be generally treated as a supply of services under the VAT Act, as it usually involves the acquisition of intangible assets.

If PV projects are acquired, tax becomes chargeable when the service is completed (tax point), unless it has been paid for earlier. Even if this is widely disregarded in business practice, please note that if the sales invoice for the disposal of a PV project is issued at a later date, the tax point will not be deferred. In this context, particular attention should be paid to the moment of transferring the last rights (administrative or civil law rights), which altogether make up the photovoltaic farm project.

CIT

If a taxpayer acquires a PV project, the cost of its acquisition is a tax-deductible expense which should be accounted for as depreciation charges. This is because this expense is necessary to build a photovoltaic farm, which is a set of tangible and (in some cases) intangible assets.

For the seller, the disposal of property rights will generate income in an amount substantially equal to the consideration received. The date of income recognition will depend on the nature of the transaction but will generally be on the earliest of the following events: disposal of property rights, issue of an invoice or payment.

5.2. SHARE DEAL

VAT and transfer tax

In practice, the purchase of SPVs typically involves transfer tax; VAT is payable in very few cases.

First, it must be checked if an SPV should be treated as an enterprise or its organised part. The sale of an enterprise or its organised part is not liable to VAT.

If the sale of shares cannot be classified as the sale of an enterprise or its organised part, it is just the sale of shares. Generally, an ordinary sale of own shares is not subject to VAT because it is not treated as part of taxable business operations.

However, the sale of shares may be VATable if:

- the seller is professionally (as part of its business) involved in investing capital by investing and trading in shares of other companies, or
- the seller is involved in managing the company being sold to an extent exceeding the obligations of the seller as a shareholder (e.g. by providing administrative, financial, commercial or technical services).

Where the sale of shares is subject to VAT, it is still most often exempt from that tax.

However, this exemption does not apply in certain cases specified by law. The aim is to exclude from VAT exemption a fictitious sale of shares, which in fact is the sale of certain assets held by the company.

In all other cases, the sale of company shares will be either not liable to VAT or VAT exempt. It is then subject to transfer tax instead. The acquisition of shares in an SPV triggers a tax liability for the purchaser upon entering into such a civil law transaction. The taxable base is the market value of the shares.

The market value of a civil law transaction is determined on the basis of average prices used in trading in things of the same kind and sort – taking into account their location, condition and degree of wear and tear – and in trading in property rights of the same kind, as of the day of performing the said transaction, without deducting debts and burdens. Contrary to what you might think, it can be complicated to assess the taxable base for transfer tax. Firstly, the market value most often does not correspond to the nominal value of shares. Secondly, it may even not correspond to the purchase price agreed upon by the parties.

Thirdly, the phrase “without deducting debts and burdens” raises problems of interpretation, particularly when the acquired company is burdened with various debts. For larger transactions, it may often make sense to use the support of a property appraiser. The transfer tax rate is 1% of the market value of the shares sold

CIT

Expenses for the acquisition of shares in SPVs will not be tax-deductible upon their acquisition. They may be tax-deductible if the SPV shares are sold later. In this case, not only the price of shares but also any other expenses required to acquire the shares qualify as tax-deductible. For example: these can be:

- share valuation costs;
- agent's commission;
- notarial and administrative fees;
- stamp duty;
- transfer tax.

The entity disposing of the SPV shares will earn income qualified as capital gains. Income will arise on the earliest of the following events: disposal of shares, issue of an invoice or payment.

PIOTR GAJEWSKI, JAKUB WAJS

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6. BUSINESS STRUCTURE IN THE CONTEXT OF CORPORATE INCOME TAX

When deciding on the business structure, you should bear in mind that this decision will also affect the amount of CIT. Therefore, investors should be aware of the fact that any of their business decisions may have various tax implications.

6.1. TAX RATE

In the context of CIT, enterprises should consider how to develop the project. What matters is whether the project will be developed within a single company or by so-called special purpose vehicles (SPVs), where each is to own a farm of no more than a few MW.

For CIT payers, the key point to mention are different tax rates, the amount of which depends, among other things, on the amount of income earned by taxpayers in a tax year. It is therefore worth checking whether a multi-company structure will allow the use of a lower CIT rate.

The basic CIT rate is 19%, however, a taxpayer whose revenue earned in a tax year did not exceed 2 million euro (converted into Polish zloty at the relevant exchange rate) may enjoy a 9% tax rate.

The preferential tax rate may be used by a small taxpayer or a taxpayer starting a business (there are some exceptions to this rule). A small taxpayer is one whose sales revenue (including VAT) did not exceed the threshold of 2 million euro in the previous tax year. Thus, the status of a small taxpayer does not apply to an entity that is just starting up, but the rule applies only to the year of starting business. The manner in which the taxpayer is formed is also relevant – a taxpayer formed, for example, as a result of transformation, merger or demerger of taxpayers in the year of starting business and the year immediately following it will not benefit from the 9% rate.

In most cases, companies intending to sell electricity can forecast expected revenues since energy production volumes are easy to predict. Please note, however, that a company using RES auction support should take into account its expected revenues from the sale of energy on the market and revenues from having its negative balance (if any) covered. Taking into account only the bid price will be an oversimplification that may cause a significant deviation from the real tax results. For tax purposes, a negative balance should be accounted for as revenue and a positive balance – as an expense.

Given that the projected revenues will be constant, you can estimate a safe amount of MW per company so that its revenues fall under the 9% CIT threshold. Please remember, however, that if several SPVs are established, each of them will be treated as a separate taxpayer. Any cash flows between companies should be made in consideration of transfer pricing regulations. In a holding structure where income is transferred by means of dividends to the parent company which is also an incorporated company, such dividends may often be exempt from tax provided that the holding structure is stable. However, other cash flows between companies should be carefully checked. Investors should not fully exclude the risk of additional tax burdens and any transaction between companies should be monitored.

6.2. TAX-CONSOLIDATED GROUP

Separate taxation of each entity is not the only model allowed under Polish law. The taxpayer may also be a group of at least two commercial law companies that are linked by capital and meet the requirements of the CIT Act. Such a structure is called a tax-consolidated group.

The requirements for a tax-consolidated group are as follows:

- a tax-consolidated group may only be formed by limited liability companies, simple joint stock companies or joint stock companies established in Poland,
- the average share capital per company may not be less than 250,000 zloty,

vthe parent company holds a direct 75 per cent share in the share capital of subsidiaries,

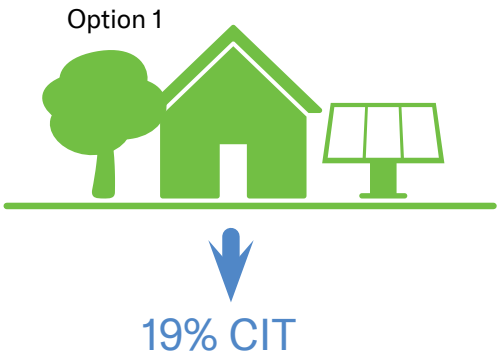
- no tax arrears with respect to the state budget.

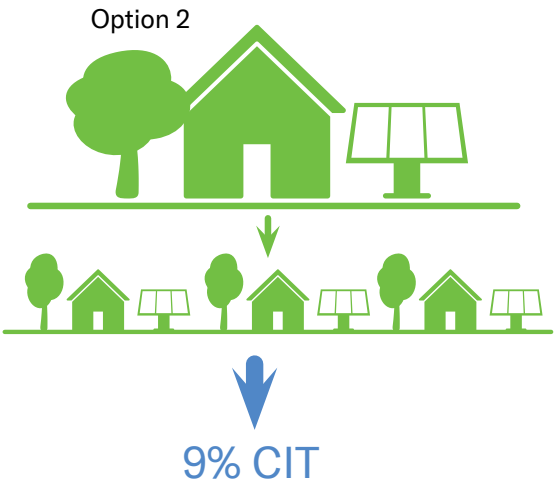
A tax-consolidated group brings numerous advantages to its members. The tax payment procedure is simplified as all tax is accounted for solely by one entity that represents the group. This also brings other tax advantages – group members do not have to worry about caps on debt financing costs for transactions between themselves. They also do not need to prepare local transfer pricing documentation for transactions between group members. However, simplified transfer pricing documentation does not exempt members of a tax-consolidated group from the obligation to comply with the arm's length principle in transactions between them. When it comes to transactions with entities outside the group, companies must comply with all documentation obligations.

In tax-consolidated groups, the surplus of total revenues of all group members over their total losses is considered as income. The law also offers a favourable solution when a tax-consolidated group makes a loss, as the loss is not covered by the income of the individual companies if the group ceases to exist.

Each member of the tax-consolidated group will be jointly and severally liable with the other members for CIT liabilities for the term of the agreement. A tax-consolidated group cannot enjoy the preferential rate intended, among others, for small taxpayers (i.e. 9%), which means that it will be taxed at the 19% basic rate.

The concept of a tax-consolidated group seems to be worth considering in more complex holding structures that include not only production companies but also companies supplying farm components, making EPC transactions or acting as financing providers.





6.3. MINIMUM CORPORATE INCOME TAX

A minimum corporate income tax has recently been introduced in Poland, which means that also taxpayers anticipating a loss or low profitability cannot avoid income tax.

This tax applies to taxpayers who either have made an operating loss or have achieved a profitability of no more than 2%. The regulations make it clear how to calculate the loss and profitability. When calculating the loss or profitability, depreciation and amortisation charges, among other things, are not taken into account. This may be particularly relevant in the RES industry, where a significant part of the costs is accounted for through depreciation of tangible assets that make up the power plant.

However, the law exempts certain entities from the minimum tax.
These are, among others:

- small taxpayers,
- taxpayers starting their business in the tax year in which they start their business and in two consecutive tax years immediately after that tax year,
- taxpayers that earned in a tax year revenues lower by at least 30% in relation to the revenues earned in the tax year immediately preceding that tax year.

THE TAX IS 10% OF THE TAXABLE BASE.

The taxable base is the total of:

- 1.5% of operating income (income other than capital gains),
- debt financing costs incurred for associated enterprises to the extent that these costs exceed an amount calculated using the relevant cap (the so-called 30% of EBITDA for tax purposes),
- costs of certain intangible services (e.g. consultancy services, fees for the use of know-how) incurred for associated enterprises to the extent that these costs exceed the so-called 5% of EBITDA for tax purposes plus 3 million zloty.

The minimum income tax laws have been in place since the beginning of 2022, but even before the end of 2022, they underwent significant changes (the changes have been in effect since 1 January 2023). Moreover, the lawmakers decided to suspend it until the end of 2023, which means that taxpayers will pay the minimum tax for the first time in 2025 when accounting for their tax for 2024.

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07 CAPPING DEBT FINANCING COSTS

7. Capping debt financing costs – specificities of the RES industry

7.1. RULES FOR CAPPING DEBT FINANCING COSTS

The tax burden is greatly affected by the amount of tax-deductible expenses.
Such expenses include debt financing costs, which are understood as all types of costs related to obtaining funds from other entities (not only associated enterprises).

The list of such expenses is not exhaustive, but the most common ones include interest, fees, commissions, bonuses, interest parts of lease instalments, penalties for late payment or costs of securing liabilities.

Practice shows that debt financing costs particularly affect the RES industry, as investment projects are very often financed from (bank) loans. The Polish lawmakers have decided that such costs may be classified as tax-deductible only up to a statutory cap. The costs over the excess debt financing costs are excluded from tax-deductible expenses.

'Excess debt financing costs' mean the amount by which taxpayer's (tax-deductible) debt financing costs exceed the interest income earned by the taxpayer.

Interest income means:

- interest income, including capitalised interest,
- economically equivalent interest income corresponding to the debt financing costs.

The cap is:

- 3 million zloty
- 30% of the so-called EBITDA for tax purposes, if it is higher than 3 million zloty.

7.2. CAPPING DEBT FINANCING COSTS IN THE CONTEXT OF LONG-TERM PUBLIC INFRASTRUCTURE PROJECT

By law, excess debt financing costs should be calculated exclusive of debt financing costs arising from (bank) loans used to finance a long-term public infrastructure project for which the following conditions are jointly met:

1)) project developer is taxable in an EU Member State;
2)) project-related assets are entirely located in an EU Member State;
3)) borrowing costs are entirely reported for tax purposes in an EU Member State;
4)) income is entirely earned in an EU Member State.

FOR THE RES INDUSTRY, THIS EXEMPTION MAY PROVE PARTICULARLY IMPORTANT.

If a PV farm was classified as a long-term public infrastructure project, this would mean that the costs of financing such a power plant would not be subject to the cap on tax-deductible expenses.

The statute defines a long-term public infrastructure project as a project to deliver, upgrade, operate or maintain a significant asset in the general public interest.

Doubts therefore arise as to whether, according to the above definition, investments involving construction and maintenance of renewable energy power plants can be considered a long-term public infrastructure project. This issue has been a bone of contention between revenue authorities and power plant owners. To date, we have seen a number of advance tax rulings denying wind and solar power plant owners the use of the said exemption.

However, appeals against those rulings have led to judgments issued by provincial administrative courts stating that the construction of a wind or photovoltaic farm may be considered a long-term public infrastructure project, and as long as other conditions are met, the exemption from capping debt financing costs may apply to a project serving to ensure national energy security.

In this context, the exemption available to long-term public infrastructure projects poses an opportunity for PV farm owners. Given the unfavourable approach of revenue authorities and no judgments issued by the Supreme Administrative Court in such cases, the only safe way to take advantage of such preferential treatment is to apply for an

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8. DEPRECIATION

Depreciation of a photovoltaic farm is very important to every investor because it is through depreciation that virtually the total farm construction cost is recognised in expenses (this includes not only construction as such, but also the costs of all services directly related to the investment process, lease payments or interest on loans taken out to implement the project, accrued until the date on which the tangible assets are brought into service).

8.1. CLASSIFICATION OF TANGIBLE ASSETS

To determine correctly the depreciation rates, the farm equipment must be classified according to the Polish Classification of Tangible Assets (CTA). This must be done based on technical knowledge, so even similar investment projects may be classified differently. Apart from that, very different and ever more modern construction technologies are being applied.

Taxpayers typically classify photovoltaic panels as "Other turbine generator systems and power generating units", coded CTA 348, with a maximum annual depreciation rate of 7%, or as "Other non-industrial equipment", coded CTA 669, with a maximum annual depreciation rate of 10%. Neither the CIT Act nor the description included in the CTA provide a clear clue as to which classification is more correct.

Other farm components must be classified correctly as well. Whereas the identification of e.g. roads or lighting should not pose any major problems, such problems may arise when it comes to classifying the farm's various power equipment. Therefore, it is best to use the advice of tax or technical experts.

Taxpayers may also apply for a written official opinion on the coding of tangible assets according to the Classification of Tangible Assets to the Centre for Classifications and Nomenclatures of the Statistical Office in Lodz. Such an opinion may make correct classification easier, but the Statistical Office may also classify several PV farm components as one tangible asset. The classification provided in the above opinion is not binding on the taxpayer or revenue authorities, but revenue authorities rarely challenge it. Conversely, if a taxpayer obtains such an opinion but does not comply with it, revenue authorities may be suspicious. Therefore, caution should be exercised when applying for tangible asset classification to the Statistical Office.

8.2. DEPRECIATION METHODS

Taxpayers may use the following methods to depreciate tangible assets making up a photovoltaic farm:

- straight-line method – depreciation charges should be made every month or quarter at a fixed depreciation rate calculated on a fixed depreciation base. The maximum depreciation rates for individual tangible assets are specified in the List of Annual Depreciation Rates made an annex to the CIT Act. An asset can also be depreciated using one-off charge at the annual depreciation rate at the end of the tax year. Straight-line depreciation should be applied from the first month following the month in which an asset is entered in the records;
- declining balance method – in the first tax year of use, the tangible asset is depreciated at the rate specified in the List of Annual Depreciation Rates increased by a factor not higher than 2.0. In the following years, depreciation charges are made on the asset's initial value (cost) reduced by the depreciation charges made so far.

This means that the depreciation charges are significantly higher than the standard charges in the initial years and that they decrease over years.

Declining balance depreciation is only applied to machinery and equipment classified to groups 3-6 and 8 CTA and to vehicles excluding passenger cars.

8.3. OPTION TO INCREASE THE DEPRECIATION RATE

The legislator has permitted the use of higher depreciation rates than those specified in the List of Depreciation Rates for certain types of tangible assets in exceptional cases.

The depreciation rates are then increased by a relevant factor (by 1.2 or 1.4 or 2.0 depending on the tangible asset being depreciated).

Reason for applying a higher rate	Tangible assets to be depreciated	Maximum factor
use in difficult conditions	buildings and structures	1.2
use in bad conditions	buildings and structures	1.4
more intensive use relative to average conditions, or special technical efficiency required	machinery, equipment and vehicles, excluding sea vessels	1.4
fast technological progress	machinery and equipment classified to groups 4-6 and 8 CTA	2.0

Tangible assets are used in difficult conditions if they are continuously exposed to water, steam, strong vibration, sudden temperature changes and other factors accelerating the asset's wear and tear.

Tangible assets are used in bad conditions if they are exposed to destructive chemicals, especially when they are used to produce, make or store caustic chemicals.
This also applies when a building or structure is exposed to destructive chemicals which are dispersed in the atmosphere or water, or are given off as vapour, and which originate from nearby facilities.

Machinery, equipment and vehicles requiring special technical efficiency are assets used in three-shift operation, although they have not been designed for being used in continuous operation mode, used in all-terrain conditions, in woodland, underground or under other conditions that indicate more intensive wear and tear.

Machinery and equipment of groups 4-6 and 8 CTA subject to fast technological progress are machinery, equipment and facilities with built-in microprocessor or computer systems performing complex functions thanks to the use of state-of-the-art technology, as well as other scientific & research and experimental & manufacturing equipment.

As photovoltaic farms are exposed to weather conditions and often use advanced solutions (e.g. trackers, storage or other equipment), it is worth considering the option to apply a higher depreciation rate.

8.4. OPTION TO REDUCE THE DEPRECIATION RATE

As a rule, taxpayers may freely reduce depreciation rates relative to the rates specified in the List. The only condition is that the taxpayer must change the rate starting either from the month in which the asset is entered in the records or from the first month of each subsequent tax year. There are no restrictions as to the type of tangible assets in respect of which depreciation rates may be reduced. This means that the taxpayer may reduce the depreciation rates of all tangible assets.

According to the most recent case law (ruling of the Supreme Administrative Court of 3 February 2022, file no. II FSK 1413/19), taxpayers may reduce straight-line depreciation rates of tangible assets retroactively, taking into account the statute of limitations for tax liabilities. The laws only specify the period from which the rates may be changed, whereas they neither stipulate any date at which the taxpayer must enter the reduced rates in the tax books nor prohibit a retroactive change of depreciation rates. What matters is that the change must only be made from the first month of each tax year. At the same time, it is fully up to the taxpayer to decide when to change the depreciation rate. The taxpayer's decision to reduce depreciation rates will also have retroactive effect.

8.5. LIMITATION OF DEPRECIATION CHARGES THROUGH CAPPING DEBT FINANCING COSTS

If the taxpayer uses external financing in the investment process, the initial value of the asset for tax purposes should include, among others, interest accrued until the date of bringing the asset into service.

In such a case, the taxpayer should remember that the calculation of the excess debt financing costs – and, consequently, any non-tax-deducible part of debt financing costs – should also take into account e.g. the interest included in the asset's initial value.

The exception to this rule are debt financing costs resulting from loans and borrowings used to finance long-term public infrastructure projects, which could present for RES industry players an interesting option to derive tax advantages. This topic is discussed in more detail in chapter "Capping debt financing costs – specific features of the RES industry."

If the excess debt financing costs are excluded from tax-deductible expenses in a tax year, they can be included in those expenses in the following five tax years provided that the taxpayer observes the rules and limits laid down in the legislation regulating debt financing costs.

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9. REAL PROPERTY TAX

9.1. SPECIFIC FEATURES OF THE RES INDUSTRY

The obligation to pay real property tax on photovoltaic farms in Poland continues to be a regular bone of contention in tax and administrative court proceedings. As there is no consistent practice of revenue authorities, most investors explore legislation to find the best and safest solutions for their business.

According to the Local Taxes and Fees Act of 12 January 1991, the following real properties are subject to real property tax:

1. land;
2. buildings or parts thereof;
3. non-building structures or parts thereof used for business purposes.

What is specific about the RES industry is that investors do not build photovoltaic farms on their own land. Those farms are usually located on agricultural land which investors lease from individuals (e.g. farmers). At the same time, PV farm facilities are usually not permanent structures – they are built for temporary use.

Importantly, some photovoltaic farm components are classified as structures, whereas some other components are not. There is a lot of controversy around how to correctly identify farm components to be classified as structures.

Bearing this in mind, it is worth presenting the following important issues regarding real property tax on photovoltaic farms.

9.2. TAXPAYER STATUS

LAND

As mentioned before, a lot of photovoltaic farms are built on agricultural land leased from individuals. A lease contract transfers the right of possession and use to the lessee, thus allowing them to derive profits from the leased object. Therefore, a question arises of whether such an agreement also transfers the tax obligation from the lessor to the lessee. The answer depends on who the lessor is.

If the land is leased from a private entity (other than the State Treasury or a local government unit), the lease agreement does not transfer the taxpayer status. In other words, the land owner continues to be the taxpayer of real property tax on the leased land.

In turn, if the State Treasury or a local government unit is the owner of the leased land, it is the lessee (investor) who will be the taxpayer of real property tax.

Please note that according to the current case law and legal doctrine, the transmission easement agreement, which is very common, and in the case of a photovoltaic farm investment project – even indispensable, does not transfer possession, and thus does not result in the transfer of the taxpayer status, even if the land is owned by the State Treasury or a local government unit.

BUILDINGS AND STRUCTURES

Not only land but also buildings or their parts and (non-building) structures or their parts, used for business purposes, are subject to real property tax. Generally, the owner of the land plot on which a building or structure is located is also liable to tax on that building or structure.

THIS USUALLY LOOKS DIFFERENT FOR THE RES INDUSTRY

Not so much because of tax issues, but in order to provide civil-law safeguards and protect business interests, the standard practice is to state in the contract that the buildings and structures located on a land plot are temporary and are only to be used for a limited period, and that the farm's period of operation is technologically limited. In addition, the lessee is usually obligated to remove all farm components from the land plot after the end of the lease contract. In effect, the lessee (investor) remains the owner of the buildings and structures, which is in most cases explicitly confirmed in the lease contract.

It seems that revenue authorities do not question the above-described practice with regard to structures. There have been sometimes doubts with regard to buildings. However, as the only building(s) on the photovoltaic farm is(are) usually (a) transformer station building(s), the tax amounts involved are rather low, so the problem is rather minor.

9.3. TAX AMOUNT

The amount of real property tax largely depends on two factors: the taxable base and the tax rate. This is presented in the table below.

	Taxable base	Rate
Land	area in m^2 or ha – depending on how the land is classified	laid down in the resolution of the Municipality Council having jurisdiction over the area on which the taxation object is located, but may not be higher than the maximum rates stipulated in the statute
Buildings	usable area in m^2	
Structures	initial value determined as of 1 January of the tax year, on which depreciation charges are made in that year; or market value if no initial value has been determined	

According to statute, land used for business purposes does not include, among others, land across which the following passes:

- electricity supply and transmission facilities;
- other similar facilities of a power transmission or distribution company, and land occupied by buffer zones surrounding the facilities, unless the land is also used for conducting business other than that mentioned above.

9.4. TAX LIABILITY

In most cases, tax becomes chargeable on the first day of the month following the month of the circumstances triggering the tax obligation. This looks different for newly constructed buildings and structures: the tax on them becomes chargeable on 1 January of the year following the year in which the construction was completed or in which the structure or building or parts thereof started to be used before being completed.

This means that if the construction of a photovoltaic farm is completed in e.g. February 2023, the real property tax becomes chargeable no earlier than 2024. If the construction is completed in December 2023, the real property tax also becomes due in 2024. This example demonstrates that through appropriate planning of the construction process an enterprise may secure even one year of tax holidays for its operations.

9.5. CLASSIFICATION OF STRUCTURES – TAX CONTROVERSIES

Real property tax law is not precise and invokes non-tax (construction) law, thus causing various interpretation difficulties. This becomes especially apparent when it comes to the classification of a structure as a non-building structure. Proper application of laws also requires technical knowledge, which is a significant hurdle for interpreting the law or calculating the tax. In the context of numerous case law ambiguities and inconsistencies, it can be seen that revenue authorities strive to impose real property tax on such photovoltaic farm components as transformers, transformer stations or other power equipment.

According to the standpoint which seems to prevail at the moment, photovoltaic cells are not subject to tax, whereas mounting structures for PV panels are subject to tax as technical equipment structural components. This viewpoint is presented in rulings of administrative courts, including the Supreme Administrative Court, and seems to be accepted by municipalities.

However, controversies still exist regarding power equipment, which is often considered as subject to real property tax by being classified – depending on the approach – as either installations constituting power grid (technical grid) components or technical equipment attached to a structure (technical grid) to enable the use of the structure according to its intended purpose.

Revenue authorities more and more often initiate tax inquiries or inspections aiming specifically to levy tax on such equipment.

Despite the taxpayer-unfriendly practice of revenue authorities and inconsistencies in case law, it is worth noting the first rulings that give photovoltaic farm owners a hope for interpretation changes to their favour.

For example, the Supreme Administrative Court ruled on 6 December 2022, (file no. III FSK 590/21) that transformer stations ensured the intended use of other power generating set components, i.e. photovoltaic cells and inverters, and not the photovoltaic plant's structural component. If photovoltaic panels and inverters are not treated as a structure, the transformer stations connected to them, thus making up a power generating set together with those panels and inverters, cannot be considered structural components enabling the use of a structure according to its intended purpose, and thus cannot themselves be structures subject to real property tax.

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10. EXCISE DUTY OBLIGATIONS OF PRODUCERS

10.1. EXCISE DUTY PAYABLE BY PRODUCERS

Electricity producers must remember that the electricity they sell to end consumers in Poland is subject to excise duty. End consumers are entities that neither hold a licence for the production, transmission, distribution or sale of electricity nor trade in electricity as stock-exchange intermediaries or as brokers.

Consequently, in practice, producers that have signed an electricity sale agreement with a trading company holding a relevant electricity trading licence will not be liable to excise duty on electricity sold in this manner. Excise duty will only be payable on the sale of electricity to entities not holding the licence.

Moreover, excise duty applies to electricity consumption, e.g. when electricity is produced and self-consumed by an entity holding a licence for electricity production or by an entity not holding a licence for electricity production, storage, transmission, distribution or sale.

Electricity consumption does not cover losses resulting from its transmission, distribution or storage, except for electricity used in connection with its transmission, distribution or storage and electricity taken illegally.

Excise duty is currently PLN 5 per 1 MWh.

10.2. EXEMPTION OF CONSUMED ELECTRICITY FROM EXCISE DUTY

Electricity consumed to produce electricity or maintain electricity production processes is exempt from excise duty.

Tax rulings define electricity production for exemption purposes as “a certain physical and chemical transformation of an energy carrier into electricity” and maintenance of production processes as “the maintenance of equipment used to produce electricity in a state enabling the resumption of electricity production after a period of downtime resulting from e.g. the service or repair of a given device” (e.g. advance tax ruling of the Head of the National Revenue Information Service of 1 June 2018, file no. 0111-KDIB3-3.4013.77.2018.1.JS and judgments invoked in that ruling).

In the case of photovoltaic farms, exempt from excise duty will be the consumption of electricity to supply power facilities essential for the operation of a power generating set.

In turn, no excise duty exemption will apply to electricity consumed e.g. to power the lighting or a surveillance system.

In addition, consumption of electricity produced in generators of a total output not exceeding 1 MW by an entity which consumes that electricity is exempt from excise duty. This means that no excise duty has to be paid if the plant output does not exceed 1 MW and the energy is self-consumed.

The exemption applies regardless of whether or not the electricity producer holds a licence. The limit of 1 MW applies to all of the taxpayer’s generators, even those which the taxpayer uses under a lease, rental or similar agreement. Additionally, the taxpayer is entitled to the exemption if it has generators with a total output over 1 MW but its actual power consumption is below 1 MW.

10.3. APPLICATION FOR REGISTRATION

An application for registration for tax duty should be filed before the earlier of:

- the sale of electricity to an end consumer in Poland;
- the consumption of electricity by a licence holder;
- the consumption of electricity by a non-licence holder that has produced the electricity.

No application for registration must be filed if electricity is being sold exclusively to a trading company (or any other licence holder) and if the used electricity is produced by the entity's own generators and does not exceed 1 MW.

However, if an entity sells energy to a trading company but consumes over 1 MW of electricity produced by its own generators, it must apply for registration, even if the electricity it consumes is exempt from tax duty for another reason.

10.4. TAX RETURN

A tax return must be filed in the following cases:

- the sale of electricity to an end consumer in Poland;
- the consumption of electricity by a licence holder;
- the consumption of electricity by a non-licence holder that has produced the electricity.

The filing deadlines are as follows:

- taxable energy consumption by both licence holders and non-licence holders – by the 25th day of the month following the month in which the electricity is consumed;
- sale of electricity to an end consumer in Poland – by the 25th day of the month following the month in which:
  - the payment deadline specified in an agreement regulating the payments for electricity supply expires;
  - if the agreement specifies no payment deadline – the payment deadline specified on the invoice or another document issued by the taxpayer to evidence the fee for the electricity sold by the taxpayer;
  - if neither the agreement nor the invoice specifies any payment deadline or if the invoice does not show any fee for electricity sold in that period – in the month following the month in which the invoice or the document is issued.

If the taxpayer sells all energy to a trading company (or another licence holder), no tax return has to be filed unless the taxpayer is obliged to do so to report energy consumption.

Taxpayers who do not have to file monthly tax returns to report the sale of energy to end consumers or energy consumption subject to excise duty, and who are exempt from excise duty on energy consumed to produce electricity and maintain production processes, are obliged to file quarterly tax returns by the 25th day of the second month of the following quarter. If the taxpayer files monthly returns, the information about energy consumption which is excise duty-exempt for the above-mentioned reasons will already have to be disclosed in those returns.

It seems that the taxpayer is not obliged to disclose the consumption of up to 1 MW of electricity produced from the taxpayer's generators in tax returns, and if such electricity consumption is the taxpayer's only activity subject to excise duty – he need not file any returns at all.

10 EXCISE DUTY OBLIGATIONS OF PRODUCERS

10.5. ENERGY QUANTITY RECORDS

Energy quantity records must be kept if:

- the taxpayer sells electricity to end consumers;
- the taxpayer holding a licence consumes electricity;
- the taxpayer not holding a licence consumes self-produced electricity.

No energy quantity records must be kept by entities producing and consuming up to 1 MW of electricity from their own generators.

However, taxpayers have to keep energy quantity records if they enjoy excise duty exemption for other reasons.

Records may be kept in paper or electronically and must be retained for inspection purposes for 5 years counted from the end of the calendar year in which the records were prepared.

Energy quantity records must be kept on the basis of readings taken from the meter of the end consumer or the entity consuming electricity, and if there are no electricity meters, on the basis of the proportional level of energy taken by individual devices, as specified in the documentation kept by the taxpayer.

The records must include data required to calculate, with accuracy of up to 0.001 MWh, the monthly totals of:

- electricity produced, acquired intra-Community, imported or purchased in Poland;
- electricity sold to end customers in Poland;
- electricity sold to licence holders;
- electricity supplied intra-Community and exported;
- electricity consumed for own purposes;
- electricity exempt from excise duty according to certain provisions of law;
- electricity losses not subject to taxation.

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