Rödl & Partner

PHOTO-VOLTAICS

IN POLAND 2022

Dear Reader

We are happy to present to you our “Photovoltaics in Poland 2022” brochure. Its release coincides with an ongoing energy crisis in Europe which manifests itself by lower availability of fossil resources and rising energy prices. It seems, however, that the renewable energy sector has managed to escape the crisis. In particular photovoltaics is an area of the economy that is safe for investors and shows a steady and rapid growth.

Our brochure addresses the main challenges faced by enterprises developing photovoltaic projects in Poland. First, we answer the questions: what the Polish photovoltaic market is like for investors and what they can expect from it in 2022. Then, we reconstruct the basic steps of an investment process and address the most important tax aspects involved. As the number of mergers and acquisitions involving photovoltaic developers increases, we also present the basic aspects related to photovoltaic share and asset deals.

Our brochure is designed to not only present the regulatory environment for photovoltaics in Poland but also share our experience and practical examples resulting from Rödl & Partner’s involvement in the development of PV projects in Poland with a total capacity of several hundred megawatts. We hope that our brochure will provide you with valuable information, both about the photovoltaic market and about legal and tax issues related to the development of such projects. Please note that this brochure is for information purposes only, therefore you are welcome to contact Rödl & Partner experts directly.

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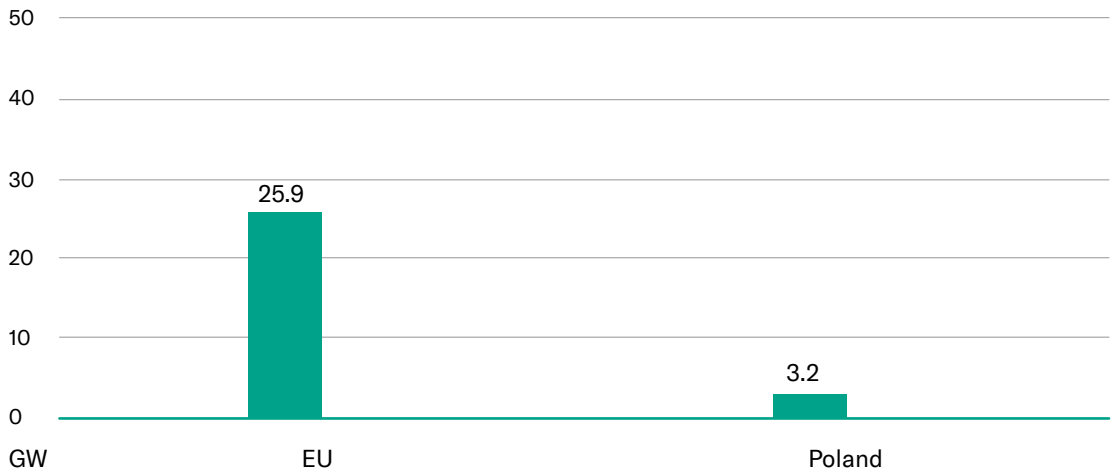
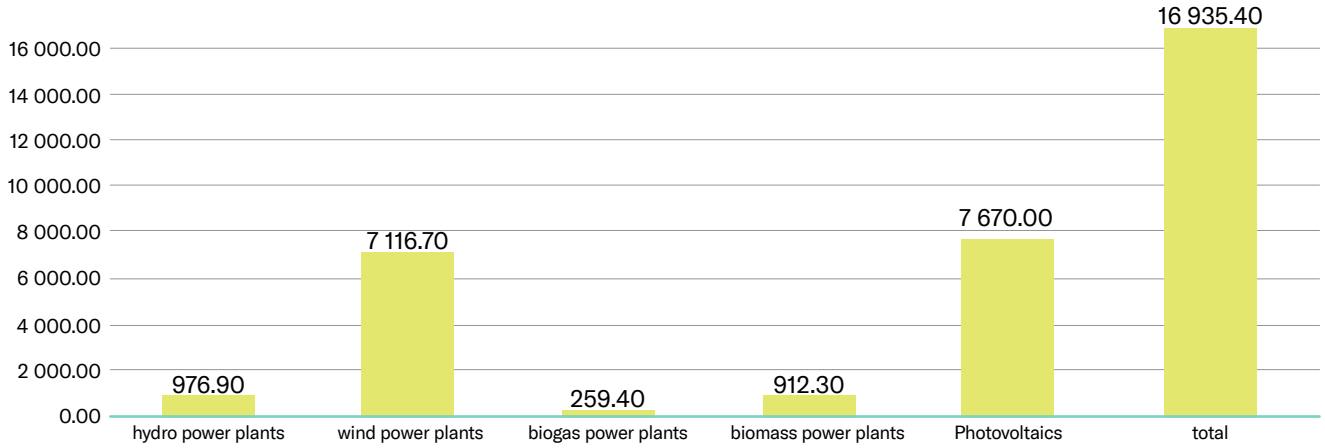
Last year, the European Union experienced the largest expansion of photovoltaics in its history. All EU Member States installed photovoltaic systems with a total capacity of 25.9 GW, which translated into a 34 percent increase compared to the capacity installed in 2020. In this context, the Polish market was particularly dynamic.

With 3.2 GW of new capacity installed in 2021 Poland was classified the fourth fastest growing photovoltaic market in Europe, ahead of, among others, France, Italy and Greece. As a result of the rapid growth of photovoltaic systems in Poland, the symbolic limit of 7 GW of power in the energy system was exceeded, and thus the total installed capacity of photovoltaic systems was for the first time larger than that of wind power plants.

Increase in installed photovoltaic capacity in Poland and the EU



Installed capacity in MW

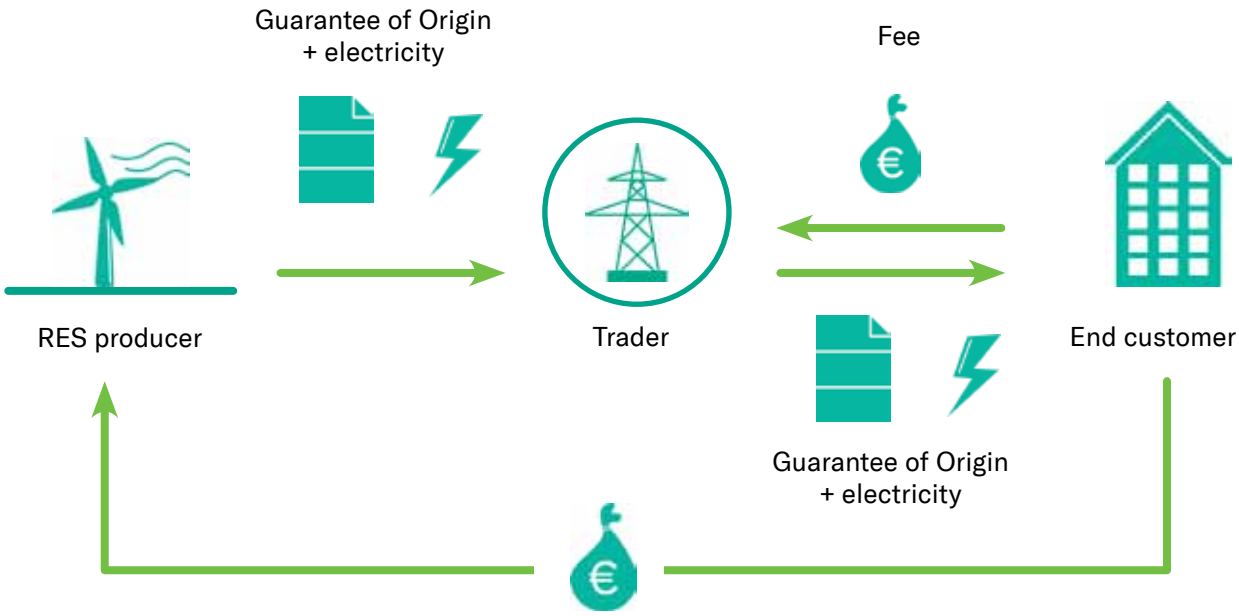


Thus, the Polish photovoltaic market enters 2022 at high speed as the leader of the domestic RES segment. However, its structure changes. Until recently, the main driving force behind the development of photovoltaics were micro-systems that provided for an attractive electricity billing mechanism using net-metering. Polish photovoltaics was therefore a small prosumer energy sector, with the electricity mostly produced by systems with a capacity of 10 kW or less. At present, large PV plants (from 1 to 100 MW) play an increasingly important role and successfully fill the energy production gap as a result of stagnation in the development of wind farms.

An important factor promoting the use of photovoltaic energy in Poland is the auction system. By means of RES auctions organised by the Energy Regulatory Office (ERO), the winning bidders are entitled to have their negative balance covered. This means that they are guaranteed compensation in the event of a difference between the electricity price declared in the auction bid and the electricity price then achieved on the market. With market prices higher than maximum prices achievable at auction, long-term secured revenues of PV plants have become the main advantage of that system. This is of key importance in the context of project financing by banks and investment funds.

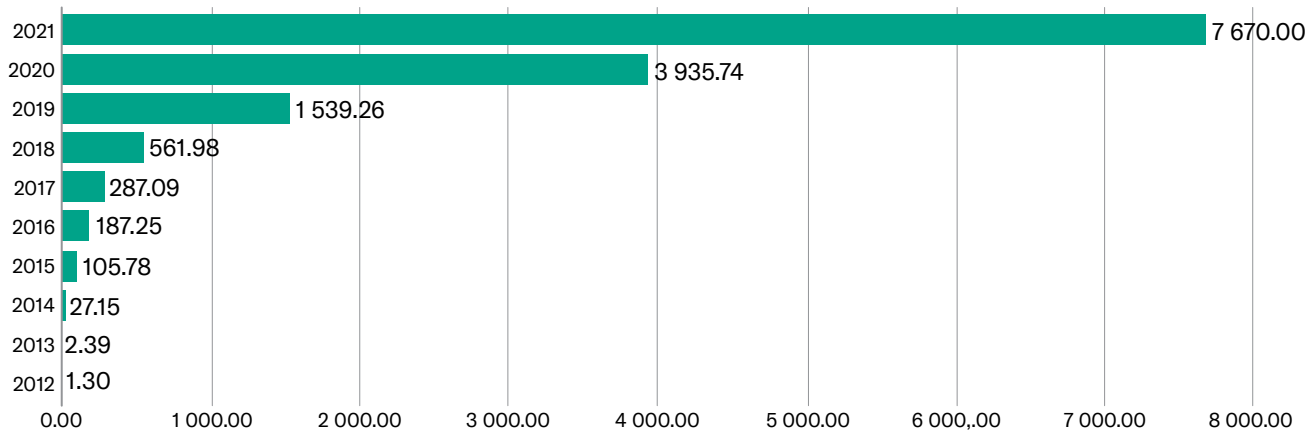
Another interesting trend observed on the Polish photovoltaic market is the growing popularity of corporate power purchasing agreements (PPA). The interest in this type of agreements is primarily driven by rapidly rising electricity prices and end users' desire to have an independent, price-stable source of electricity. Development of corporate PPAs is also coupled with a changing attitude of many Polish enterprises which more and more often implement internal standards related to environmental protection and emission reduction.

PPA STRUCTURE



1. PHOTOVOLTAIC MARKET IN POLAND

Increase in installed photovoltaic capacity in Poland 2012-2021 [MW]



What awaits us in 2022?

It seems that there is no turning back from the development of photovoltaics in Poland, especially when we keep in mind the energy and climate goals set by the European Union. One-megawatt projects enjoy unflagging popularity but we can also expect to see more and more large systems that cover even several dozen hectares with solar panels.

2022 may also be a time of accelerated technological development. Due to emerging restrictions on distribution grid connections, we expect an increased interest in constructing direct lines and energy storage facilities as well as boldly venturing into hydrogen technologies.

2. DEVELOPMENT OF A PV PROJECT

2.1 Securing the right to the real property on which the PV plant is to be built in a way that meets the requirements of banks and other financial institutions

When developing a PV project, it is necessary to secure the right to the real property on which the PV plant is to be located. As a rule, a lease is concluded between the investor, acting as a lessee, and the lessor – the real property owner. If the project is to be financed by banks or other financial institutions at a later stage of development, it is particularly important that the lease meets their requirements. When concluding a lease, the developer should pay attention to the following issues.

2.1.1 Leased property

The legal right to the real property on which the PV plant is to be located is secured by a lease with the right to derive profits (umowa dzierżawy). By virtue of the lease the lessor agrees that the lessee may use and derive profits from the real property and the lessee agrees to pay the rent. This type of contract is used because Polish laws do not address the needs of green energy industry and do not provide for any other type of nominate contract, which would effectively secure the legal right to the real property. If the lease is concluded for a PV plant, the possibility of deriving profits from the leased real property raises doubts.

> ***Good to know***
>
> *This issue has been discussed in doctrine and case law. According to the ruling of the Supreme Court, file no. IV CSK 244/12, income earned from the sale of electricity obtained by processing wind energy using wind turbines cannot be regarded as profits derived from land as defined in the Civil Code. Consequently, the contractual relationship based on which a real property is used for such purpose cannot be classified as a lease. The ruling also applies to photovoltaic farms and is very important for the industry.*

2.1.2 Term of lease

A lease under the Civil Code may be concluded for a fixed or indefinite term. From the investor's point of view, a lease for an indefinite term is very risky, as such a legal relationship can be terminated at any time with contractual or statutory notice periods. A far more favourable solution is to conclude a lease for a fixed term up to thirty years.

2.1.3 Form of the contract and its disclosure in the land and mortgage register

The laws do not provide for any special form for a lease to be valid. Therefore, the simple written form of the contract may be sufficient to secure the legal right to real property. However, the investor may find himself in trouble if the owner decides to sell the real property since the purchaser acquires the right to terminate the lease.

> ***Good to know***
>
> *The investor can avoid such a situation if he complies with certain formal requirements when signing the contract, i.e. the contract must be made in writing and with a certified date. Another requirement is that the lease must be concluded for a fixed term and the real property must be handed over to the lessee.*

However, if the lessee wishes to disclose his rights under the lease in the land and mortgage register kept for the real property, the contract must be in writing with a signature certified by a notary. As a result, the lessee will be entitled to exercise the rights arising from the entry in the land and mortgage register, for example the priority of the registered right over the unregistered right.

> ***Good to know***
>
> *Banks and other financial institutions very often require that the lessee has the lease disclosed in the land and mortgage register, so it is worth ensuring that it is concluded in the form that allows you to enter it in the land and mortgage register.*

2.1.4 Rent

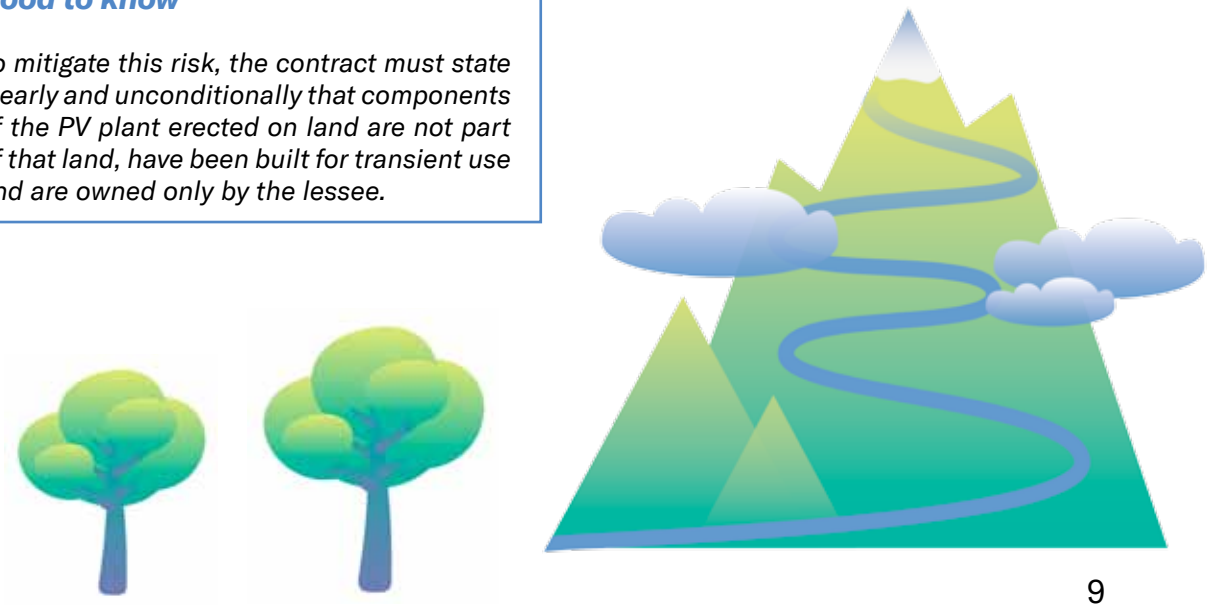
Since the lessee's obligation to pay rent is an important element of the lease, this obligation must be specified in detail. Many leases say that the rent is only payable when the construction of a PV plant begins. Often several years can pass between the time the lease is concluded and the time it is used. In this situation, the parties are bound by a contract for several years, over which time the lessee does not meet its basic contractual obligation.

> ***Good to know***
>
> *It is worth considering the so-called initial rent in a symbolic amount to satisfy the lessor's claims for the period between the lease is concluded and the lessee starts to pay the applicable rent. This will minimise the risk of such a legal relationship being challenged.*

2.1.5 Ownership of the PV system

According to the superficies solo cedit rule, buildings erected on a piece of land share that land's legal status. So there is a risk that once the system has been erected on real property, the owner of the land will also become the owner of that system.

> ***Good to know***
>
> *To mitigate this risk, the contract must state clearly and unconditionally that components of the PV plant erected on land are not part of that land, have been built for transient use and are owned only by the lessee.*



2.1.6 Right to transfer rights and obligations under the lease, right to sublease real property

For a vast majority of PV projects under development, the legal right to use real property is acquired by the investor, i.e. the company developing the project in its initial phase. It is only at a later stage of project development that the real property is made available to the company that will ultimately own the project. This can be done by transferring the rights and obligations under the lease or by concluding a sublease. Both the transfer of obligations under the lease and the conclusion of a sublease require the consent of the creditor (in this case, it is the lessor).

> ***Good to know***
>
> *It is advisable to include in the contract the lessor's consent to transfer the rights and obligations under the lease and to conclude a sublease.*

Also lending institutions are interested in joining the lessor's rights under the lease in order to secure their claims under the loan agreement. It is standard practice to transfer the investor's rights to the bank to secure the loan agreement (so-called security assignment). It is therefore worth ensuring that the investor has a free hand in this respect and the effectiveness of the assignment at this stage is not dependent on the consent of the land owner.

The above issues are the necessary minimum which investors should include in the lease.

Drafting a lease appropriately is key for the safety of your PV investment project throughout decades of its operation.

2.1.7 Effective security of cable routing from the leased real property to the grid connection point

Every investor developing a PV project prefers having the grid connection point located on the leased real property. However, for a vast majority of projects, the grid connection point is located outside the leased property and the investor is required to secure legal rights covering the area from the leased real property to the grid connection point.

The method for securing cable routing depends on whether the connections run through plots of land where there is a road (with or without public road status) or through privately owned real property.

PRIVATE REAL PROPERTY

The most common legal right to use a private real property with cable routing is transmission easement. The owner of transmission infrastructure – an enterprise developing a PV project that is about to build or has already built transmission infrastructure – is entitled to use real property by building transmission infrastructure on it and using it.

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.

REAL PROPERTY WITH PUBLIC ROAD STATUS

If real property has public road status, the legal right to use it is governed by the Public Roads Act, in particular by Articles 39 and 40 of the Act. There are several stages to obtain the legal right to use real property with public road status. The first one is to obtain a decision which is issued under Article 39(3) and (3a) of the Public Roads Act by the road administrator and allows placing construction facilities or equipment that are not used for road management or road traffic purposes in a road area.

Then, a decision under Article 40(1) and (2) of the Public Roads Act is issued authorising the occupation of a road area in order to:

– carry out construction work;
– place in a road area technical infrastructure that is not used for road management or road traffic purposes.

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. The decision authorising the placement of infrastructure in a road area is issued for a period of a few or a few dozen years and gives the legal right to place the infrastructure. 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.

REAL PROPERTY WITHOUT PUBLIC ROAD STATUS

For municipal internal roads without public road status, there is no single, structured procedure for securing cable routing. Municipalities usually issue informal permits which are not administrative decisions but authorise the placement of infrastructure. They correspond to decisions issued under Article 39(3) and (3a) of the Public Roads Act. Next, they make an agreement with the investor whereby they provide the real property for use against an annual fee for them. This corresponds to a decision issued under Article 40(1) and (2) of the Public Roads Act. Unfortunately, such security for cable routing may not be sufficient for the financing institution. Then it will be necessary to establish transmission easement on the real property.

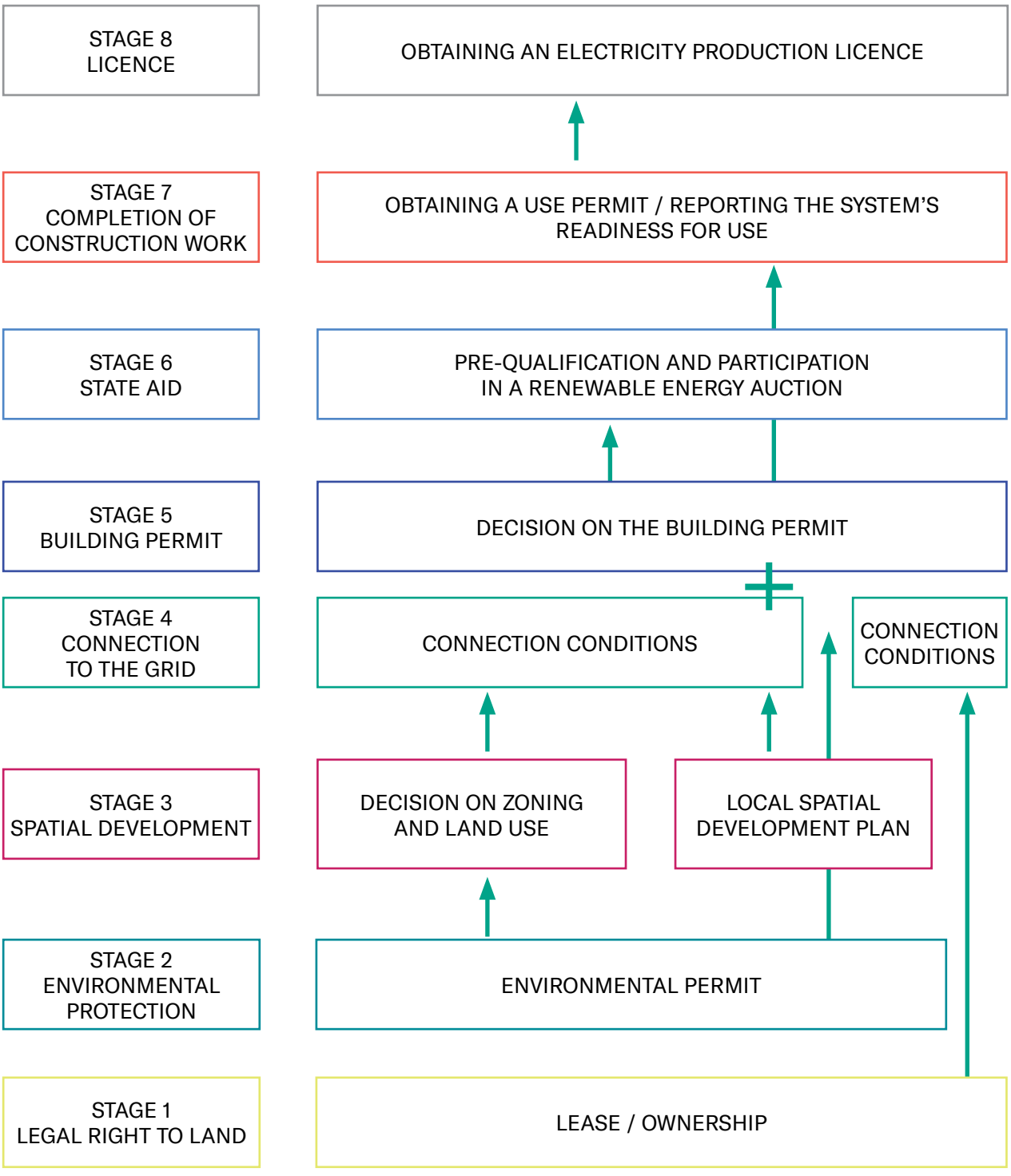
Of course, the above-mentioned legal rights to secure cable routing are not the only solutions provided for by law. Lease or innominate contracts structured in a similar way to lease are also available. Unfortunately, they are not as durable as those described above.

2. DEVELOPMENT OF A PV PROJECT

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.

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



2.2.1 Environmental permit for the project

Photovoltaic systems are used to produce green energy and therefore they should be regarded as environmentally friendly. However, large-scale ground-mounted photovoltaic systems with a footprint area of at least 1 ha, and in specific cases listed in the statute – at least 0.5 ha – are classified as projects which may potentially affect the environment. Therefore, for a vast majority of projects, a permit listing environmental conditions for the project (environmental permit) will be the first stage of the investment and construction process.

The body competent to issue the permit is the municipal authority – the head of municipality (wójt) or a city mayor. 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. Please note that the environmental permit is not discretionary and the authority may disapprove the project only in specific cases specified in the statute.

Good to know

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. This is important for investors who take over partially developed projects without a building permit and who intend to obtain a modified building permit.

Salami slicing – Salami slicing means forced division of a 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. In fact, whether or not an authority challenges such a practice in a given case will depend on the approach of that particular authority. The investment process is carried out at the level of local government units. Experience shows that the same facts may be assessed differently depending on the local practices.

2.2.2 Spatial development

Spatial development lies with the municipality. Municipalities are entitled to 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. 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. This stage precedes the issuance of a building permit.

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.

In the current legal circumstances, no local plan may even be beneficial for the investor. 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. In practice, this means that if the local plan does not provide for the development of PV systems in a given area, the construction authority will most likely refuse to issue a building permit. Most likely, because the situation is not clear-cut for the municipalities which do not provide for the location of RES systems in their zoning plan at all. There are two views on this matter. According to the first one, the location of PV systems is not possible in such a situation, while according to the opposite view, the construction authority may not refuse a building permit in such a case.

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.

Good to know

Please note that the current law has been in force since 30 October 2021. The previous legislation did not provide for exceptions – all renewable energy systems with a capacity exceeding 100 kW had to be included in the local plan. The intention of lawmakers was to facilitate the location of small photovoltaic and rooftop systems without the need to amend zoning documents by the municipality, which is a long process. However, the amending laws are worded in such a way that a doubt may arise whether they can actually be applied to the existing local plans.

ZONING DECISION

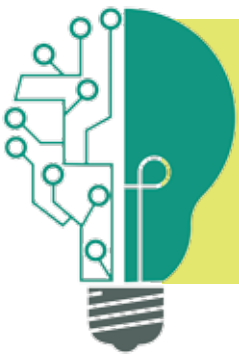
If there is no local spatial development plan for an area where the project is to be developed, a zoning decision must be obtained. As part of the zoning decision procedure, the authority checks whether the requirements for issuing such a decision, as specified in the statute, are met. To obtain a zoning decision, it is first of all necessary to comply with the so-called good neighbourhood rule. This means that 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. In short, the authority examines whether a development with a similar function already exists in the neighbourhood. Certain investment projects such as railway lines, technical infrastructure and now also renewable energy systems are exempt from the requirement of good neighbourhood. Once you have obtained a zoning decision, you can apply for grid connection conditions and a building permit.

Good to know

The good neighbourhood requirement is particularly important for investment projects involving PV farms. Of course, many projects developed on agricultural land cannot meet this requirement. Ever since the industry's birth in Poland, there has been a dual approach to the subject. For a long time, there has been a dispute over the qualification of PV systems as technical infrastructure. Practice in this respect varied depending on the municipality. The amended statute was to stop this dualism – RES systems were included in the statutory list. However, after this law had been in force for a year, case law made by administrative courts moved towards limiting the use of this exception to micro-systems, or at best to systems with a capacity of up to 500 kW. Some municipalities have followed this view. As a result, we are again dealing with a kind of dualism with respect to decisions on the location of ground-mounted photovoltaic systems.

Since agricultural land is protected, a zoning decision for soils of class I-III may be obtained only in limited cases. Plots with such soil types are in practice not considered as investment areas.

At present, the final zoning decision is valid indefinitely. It expires if for a given area another investor obtains a building permit or a local spatial development plan is adopted and its provisions differ from those included in the issued decision, unless the investor has managed to obtain a final decision on the building permit in the meantime. According to the planned changes, the zoning decision is to be valid for 3 years from the date on which the decision becomes legally binding.



Important

Legislative changes are planned to limit the location of ground-mounted photovoltaic systems based on a zoning decision. In the future, this will be possible only in specific cases. Similar to wind farm projects, the PV systems will be located, as a rule, only in areas designated in local plans. This will greatly affect the shape of the entire industry in Poland. The bill is being drafted.

2. DEVELOPMENT OF A PV PROJECT

Connection to the grid

Getting connected to the grid is one of the most important steps in the development of a PV project. Only a grid-connected system can supply electricity to consumers and earn money by selling it. Please note that this is also one of the most difficult aspects of developing a PV project – due to the large number of systems being developed, developers are competing to get connected to the distribution grid.

Good to know

Before deciding to launch a PV project, it is important to check the grid connection capacity. Polish law requires that distribution and transmission system operators publish information on the grid connection capacity available for generating units. Below are the links where the leading energy companies publish information about the connection status:

Power company	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/infoosieci/raporty/informacjeoprzylaczeniach
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/wykaz-podmiotow-ubiegajacych-sie-o-przylaczenie https://www.pse.pl/obszary-dzialalnosci/krajowy-system-elektroenergetyczny/wykaz-podmiotow-ubiegajacych-sie-o-przylaczenie

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

GRID CONNECTION CONDITIONS

This document issued by the operator confirms that a PV system can be connected to the grid and also specifies technical details related to the connection. The operator is bound to sign a connection agreement with the producer for 24 months of issuing 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.

Good to know

To obtain the 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 3,000,000 zloty.

Good to know

The application for connection conditions includes a number of appendices, the exact list of which is specified by the operators. Irrespective of the operator, some documents mentioned in the application are mandatory, including documents confirming the legal right to real property and an extract and drawing from the local spatial development plan or zoning decision to confirm that the PV plant may be located in the area covered by the application.

CONNECTION AGREEMENT

Under a connection agreement, the parties – the operator and the producer – undertake to connect the PV system to the grid. In practice, the main obligation of the operator under the connection agreement is to reconstruct the local grid, transmission facilities and other technical infrastructure so that the energy produced by the plant can be received. On the other hand, the main obligation of the producer, apart from constructing an efficient PV system, is to build the electrical power connection, i.e. the section connecting the producer's PV system to the grid connection point. The construction of this connection is an extremely important element in the development of a PV system. In addition to technical work, the construction of the electrical power connection also requires securing the rights to real properties located between the PV system and the – often very distant – grid connection point.

Good to know

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 in specific cases the connection fee for such systems to only half of the actual connection costs incurred by the operator.

2.2.4 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. In practice, a long time passes between obtaining the building permit and commencing the project, especially if the project is taken over by another investor. The reason for project suspension is often the search for a suitable contractor or the project's participation in an electricity auction organised the President of the Energy Regulatory Office.

Good to know

If the project is developed on land classified as agricultural land, this 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, therefore in most cases, this step is irrelevant in the construction process. However, this issue should be thoroughly reviewed – there are projects developed on organic land. Construction work is still possible but often involves fees of even several hundred thousand zloty.

The construction design does not have to include the connection. The connection may be constructed on the basis of notification.

2.2.5 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 above licences should be applied for upon completion of the investment process and obtaining a use permit.

Type of PV system	Authorisation	Requirements
Micro-system (up to 50 kW)	No authorisation required	None
None	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.
Large systems (above 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 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 so-called obliged seller (sprzedawca zobowiązany).

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

2.3 Tax issues

2.3.1 Corporate income tax rates

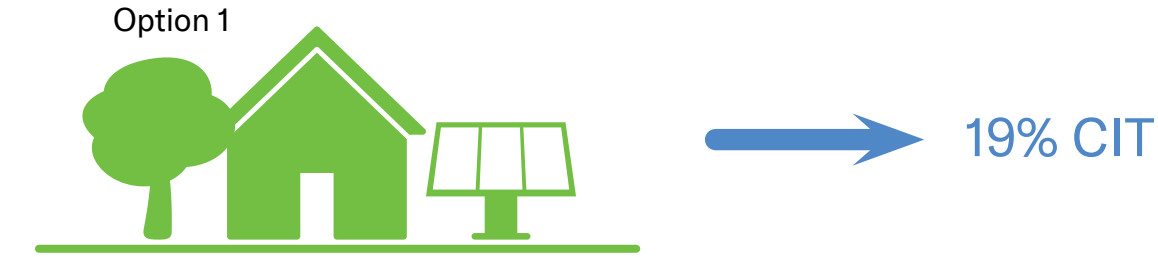
According to Polish law, taxpayers whose revenues do not exceed 2,000,000 euro (translated into Polish zloty at an applicable exchange rate) in a tax year are subject to CIT at 9%. Capital gains are also included in this limit.

The reduced tax rate of 9% is only available to small taxpayers or taxpayers starting a business (with certain exceptions). The small taxpayer has been defined as an entity whose sales revenues (including VAT) did not exceed the Polish zloty equivalent of 2,000,000 euro (translated into Polish zloty at an applicable exchange rate) in the preceding tax year. The "small taxpayer" condition does not apply in the first year of business. With respect to 2022, a taxpayer whose sales revenues for 2021 did not exceed 9,188,000 zloty gross (including output VAT) may be considered a small taxpayer.

Companies with higher revenues must pay CIT at 19%.

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 covered. Taking into account only the auction bid price will be an oversimplification that may result in a significant deviation from actual tax results, unless the company assumes that the auction price will always be above the market price, which seems rather unlikely at current auction and market prices.

Due to the real tax burden, it is worth considering a model in which PV projects are developed by smaller SPVs. Especially that in a holding structure where revenues are transferred by means of dividends to the parent company which is also an incorporated company, such dividends may be often exempt from tax provided that the holding structure is stable.



2.3.2 Tax and accounting obligations of limited liability companies

Running a business as a limited liability company involves a number of tax and accounting obligations. The most important obligations of a taxpayer being a limited liability company are listed below.

- Obligations upon commencement of business: the books of account must be opened as of the commencement date. The enterprise should also apply for registration and submit registration documents.

- When starting a business, the company should also remember about: opening an account with a Polish bank, disclosing its ultimate beneficial owners with the UBO register, obtaining qualified signatures for management board members.

- Obligations related to hiring employees: apart from remuneration payment, monthly reports must be submitted and due social insurance contributions must be paid. Another obligation related to hiring employees involves PIT advances payable by the 20th day of the month and annual returns on PIT advances withheld to be submitted by 31 January.

- CIT obligations: the enterprise should pay CIT advances (monthly, and in some cases quarterly) and prepare an annual CIT-8 return.

- With respect to payments made abroad, in particular dividends, interest, payments for various intangible services – the taxpayer should comply with withholding tax (WHT) obligations.

- VAT obligations: the first step is to register for VAT purposes. If the company intends to be a VAT-registered taxpayer (as is usually the case), registration should not be delayed as it may be difficult to deduct input VAT for the months prior to registration. Then, each month (or, in some cases, each quarter), the company must disclose and pay its VAT liabilities using JPK_VDEK (SAF-T), involving information about purchases and sales made.

- Accounting obligations: a limited liability company is obliged to keep comprehensive books of account, which in practice usually means the need to hire a professional accounting firm. The taxpayer is obliged to prepare the financial statements for the previous financial year within 3 months of the balance sheet date. The financial statements should be approved by resolutions within 6 months of the balance sheet date. Then, the financial statements must be submitted electronically to the National Court Register within 15 days of their approval. In addition to the financial statements, the Management Report must be prepared. In some cases, the financial statements must also be audited by a statutory auditor – depending on the revenues, the number of employees or the amount of total assets presented in the balance sheet. If such an audit is mandatory, the taxpayer is also required to include additional documents in the financial statements.

2.3.3 Financing options for special purpose vehicles

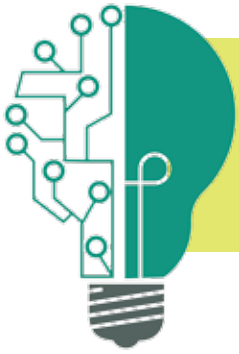
Shareholder loan

One of the options to provide financing to an SPV is by means of a shareholder loan. The funds obtained in this way are immediately available for current operations.

Whenever a loan is granted by an entity other than a financial service provider, it is subject to transfer tax. However, if the lender is a shareholder of a limited liability company, transfer tax will not apply. Please note here that there is case law that suggests that even a one-off loan granted by one company to another is subject to VAT, and thus it is not subject to transfer tax.

Please also note that if a loan is subject to VAT, it is exempt from VAT, however, from the beginning of 2022 you can opt out of this exemption and choose VAT. This solution may be useful for those corporate groups where there is one or more financing companies and the service is provided to other operational companies which are VAT-registered taxpayers.

In the case of a loan, the loan principal is tax-neutral, while only interest is tax-deductible. This refers to paid or capitalised interest and not merely accrued interest. Please note that interest may be classified as tax-deductible to the extent limited by regulations on limiting the costs of debt financing.



Important

From the beginning of 2022, interest on a loan received from a related entity to acquire shares in another company cannot be recognised as tax-deductible at all.

Interest on a loan between related parties should be set at *arm's length* to comply with transfer pricing regulations. For loans above a certain threshold, transfer pricing documentation will be required.

Taxpayers receiving financing from foreign entities may also be required to comply with the following obligations to be taken into account by the company paying out interest:
– declare the service for VAT purposes on a reverse charge basis
– deduct and declare withholding tax (WHT).

From 2023, a "hidden dividend" is to appear in the CIT Act, which may also make it more difficult for a related party to account for interest from the tax perspective.

Other financing options

Other options to provide financing to an SPV, which are provided for in the Code of Commercial Companies, include making additional capital contributions to the company and increasing the company's share capital.

The additional contributions mean that shareholders are required to pay a certain amount of money to the company, which may be repaid in the future. The additional contributions may be made only if the articles of association so provide. The amount and deadlines for the additional contributions are determined by a resolution of shareholders. Please note that the additional contributions must be required and paid by shareholders in proportion to their shares in the company.

The additional contributions made to an SPV are subject to transfer tax. The transfer tax rate is 0.5% of the amount of the additional contributions made. Transfer tax should be paid within 14 days from the date of the resolution to make an additional contributions.

For the SPV itself, the additional contributions made are not its taxable income, and, therefore, are not subject to CIT.

The additional contributions may be repaid to shareholders if they have not been made to cover the loss disclosed in the financial statements.

Share capital may be increased by amending the articles of association or – using a simplified procedure – by means of a resolution, provided that the articles of association provide for the maximum amount of the share capital increase and the deadline for it.

The share capital increase is subject to transfer tax. The tax rate is 0.5% of the amount by which the share capital is increased. Transfer tax should be paid within 14 days from the date of the resolution to increase the share capital in the company.

In terms of CIT, the amount received to increase the share capital is not taxable income of the SPV, and, therefore, is not subject to CIT. However, making an in-kind contribution to increase the share capital may trigger taxable income for a shareholder.

2.3.4 Transfer pricing and free-of-charge services

When acquiring a special purpose vehicle with a PV project, the question must be asked as to how this project came about in the SPV. As a rule, the established SPV does not develop the project on its own, as it does not have personnel, financial or technical resources to do so. Therefore, it uses development services of another entity or buys a ready-made project from that entity or combines the two – it buys a project at a certain stage of development and commissions its further development.

It often happens in business practice that development services are provided by a related entity or such entity transfers the project. It also happens that such services are provided free of charge or heavily discounted.

Such a situation generally creates a risk for both parties to the transaction:
- for the developer – assessment of taxable income by tax authorities (as it has been understated in the transaction with a related entity),
- for the SPV – income arising from free-of-charge or partially free-of-charge services.

If certain transaction thresholds are exceeded, transfer pricing documentation is also required.

3. TERMS OF SALE OF SHARES AND SALE OF PROJECTS

3.1 Terms of sale of shares

PV systems are mostly developed by project-specific companies, commonly referred to as special purpose vehicles (SPVs), which are usually limited liability companies. This solution allows an efficient sale of the project or ready-to-use system, as these are the shares in the SPV that are sold.

Special purpose vehicles operating as limited liability companies have most often a minimum share capital of 5,000 zloty and do not have a complex structure of governing bodies.

A foreign investor may decide to establish a limited liability company and obtain for it all required administrative decisions and enter into civil law contracts necessary to develop a photovoltaic farm project in Poland. However, this is a time-consuming and – in the case of large-scale PV farms – complicated process, so a vast majority of investors, both Polish and foreign ones, decide to acquire a PV project at the stage when the company has the so-called grid connection conditions and a building permit, i.e. has reached ready-to-build status. Investors also buy ready-to-build projects because, currently, only few planned systems can be connected to the grid infrastructure and the refusal to grant grid connection conditions has recently become more of a rule than an exception.

In this case, the SPV is usually at the same time:

– party to the lease of land on which the photovoltaic farm is to be erected,
– party to the connection agreement,
– entity to which the building permit has been granted.

Often, the SPV is also the RES auction winner.

Below are two ways of acquiring rights to a PV project. The first one is indirect and most popular and involves acquiring shares in an SPV. The second one is direct and involves acquiring project-related rights.

3.2 Sale of a special purpose vehicle (share deal)

SHARE DEAL is the acquisition of shares in a special purpose vehicle that has already developed a photovoltaic system project. By acquiring all shares in the SPV and making personnel changes in its management board, the investor takes control of the SPV's operations and is entitled to profit generated by the SPV as soon as the developed PV project starts to produce electricity and generate profit. Under the share deal, the PV project continues to be developed by the same entity, so there is no need to transfer individual administrative decisions obtained by the SPV. Only the shareholder changes. The SPV is acquired in several stages.

Before the investor acquires shares in the SPV, the company should undergo a comprehensive *due diligence*.

Please note that for the investor – the purchaser of shares in the SPV/PV system, a comprehensive legal analysis is one of the most important stages of the transaction. *Due diligence* is carried out by lawyers and determines whether the acquired SPV or PV project – depending on the subject of the transaction – has defects. The outcome of *due diligence* is also extremely important for negotiating business terms of the transaction. Any irregularities discovered during *due diligence* may be used when negotiating the price.

The scope of due diligence depends on the investor. It may involve selected issues or a comprehensive analysis of the legal and financial standing of the SPV. Undoubtedly, a thorough analysis of the target company provides greater certainty. Due diligence usually examines the following areas of SPV's operations:

- financial
- legal and tax
- real property
- project
- legal and energy

The main purpose of due diligence is to collect exhaustive information necessary to assess the value of an enterprise and identify factors having a significant impact on it. Following completion of due diligence, an expert team draws up a report describing the risks associated with the transaction. Depending on the level of these risks, the purchaser decides to acquire (or not to acquire) shares in a special purpose vehicle with a developed PV project.

The scope of legal due diligence varies depending on whether the transaction is a *share deal* or an *asset deal*.

An investor who intends to acquire shares in a SPV should obtain assurance that both the shares being acquired in the SPV and the SPV itself are free of any legal defects.

Due diligence on the SPV is to confirm that the shares involved in the transaction are free from any third party rights and disposing of them is not excluded or restricted. For a share deal transaction, it is particularly important to review corporate documents of the SPV, including but not limited to resolutions, (commercial) powers of attorney, articles of association, civil law contracts, as well as documents involving financial issues, employee issues, intangible property rights of financial and non-financial nature, court and out-of-court proceedings and the status of claims, environmental protection or regulatory issues (licences and permits and other administrative issues).

Below are some examples of legal and tax risks that may be identified in the course of due diligence investigations.

Legal risks
Corporate part: – no individual authorised to act on behalf of the SPV (if it is not represented by management board); – unpaid financial liabilities of the SPV; – no transfer of the PV project-related rights to the SPV; or – failure to convene the mandatory Ordinary Meeting of Shareholders within the specified period
Real property part: – no legal right to the leased real property; – no secured cable routing; contract for the placement of cable routing made for one year; – failure to disclose the rights under the lease in the relevant land and mortgage register irregularities in administrative proceedings conducted as part of the investment process.
Project part: – no document confirming the transfer of proprietary copyrights to technical documentation to the SPV; – no decision on the location of road access point
Energy part: – failure to connect the PV system before the first sale under the auction system; – failure to determine the grid connection point; – large discrepancies between the grid connection capacity and the capacity declared in the auction bid

3.3 Sale of rights to a PV project/system (asset deal)

ASSET DEAL is the most common, but not the only, way to acquire PV projects by investors. An alternative to acquiring shares in an SPV that owns a PV project/system is to acquire rights to the PV project/system.

A ready-to-build project is a PV system project (where the PV system is not yet built). In an asset deal the investor should transfer to the designated entity, among others:

– rights and obligations under the lease,
– rights and obligations under the environmental permit,
– rights and obligations under the zoning decision,
– rights and obligations under the connection agreement,
– rights and obligations under the building permit,
and before concluding the project sale agreement he should obtain an approval from the President of the Energy Regulatory Office for the transfer of rights and obligations under the PV system project (if the project is the RES auction winner), or else he will lose his rights.

In an asset deal the investor should make an agreement with a third party governing the transfer of the above rights and obligations.

For the transfer of rights and obligations under the lease, the prior consent of the lessor is required. Such consent may be included in the lease document itself. The change of the parties to the lease may also be effected by way of a trilateral agreement between the owner, the previous lessee, and the investor. If the lessor's consent has been given in a separate statement, a bilateral agreement made between the existing lessee and the new investor will be sufficient. The investor should ensure that all changes are included in the relevant land and mortgage register of the leased real property.

A key issue from the perspective of the right to the real property is to secure cable routing. If the developer is a party to an agreement on the establishment of transmission easement on the real property, the rights and obligations under the established transmission easement may be transferred to a new investor, provided that certain conditions are met. If the beneficiary of transmission easement is an enterprise (e.g. SPV) that intends to construct transmission facilities (including cables) or acquire their ownership, the rights and obligations under the established transmission easement may only be transferred to another investor together with the entire enterprise (as an asset of the enterprise) or independently (as constructed facilities).

If the transmission facilities have not yet been built, they cannot be disposed of. However, if the lessee intended to construct the facilities and for that purpose transmission easement was established as part of the operations of the enterprise (SPV) to be disposed of, the transfer of transmission easement to the purchaser of that enterprise is justified. However, it should be noted that according to the prevailing opinion a PV project may not be sold along with transmission easement established for it. Therefore, a common practice in an asset deal is to obtain a new easement for the final investor. This is one of the arguments against this form of transaction.

Please note that the process of transferring rights and obligations to a PV project/system as an alternative to acquiring shares in an SPV holding these rights involves a number of actions – both civil law actions (conclusion of civil law contracts) and administrative procedures – transfer of rights and obligations under the environmental permit, zoning decision or building permit as well as obtaining approval from the President of the Energy Regulatory Office and a licence.

The investor should also be aware of the need to include numerous additional issues in the agreement made with the third party acquiring rights to the PV project, such as:
– date and method of transferring the PV project documentation to the investor,
– transfer of proprietary copyrights to the project documentation,
– possibility of withdrawing from the contract in certain situations.

In *asset deal* transactions, due diligence does not address corporate affairs of the SPV, since the legal right to the shares of the SPV is not involved in the transaction and the purchaser does not become part of the corporate structure of the SPV. It is not the shareholder but the SPV itself being the seller of the enterprise, its organised part or individual assets held by the SPV (e.g. the PV project) that is a party to the sales contract. In this case, however, it is necessary to thoroughly check the assets to be acquired – for PV projects, these will be all administrative decisions and civil law contracts.

This type of transaction is particularly important from the perspective of PV projects developed by individuals acting as sole proprietors. Since a share deal is not possible in this case, such projects may only be sold as part of an asset deal, i.e. by way of transferring individual administrative decisions and civil law contracts to a new entity.

To sum up, a share deal is nothing more than the acquisition of shares in a special purpose vehicle that has developed a PV project. An asset deal is the acquisition of individual project-related rights and the transfer of rights and obligations under the individual administrative decisions, which together make up a PV project. Share deals are popular with industries where running a business is associated with obtaining various permits – the energy production industry using renewable energy sources is a perfect example.

3.4 Tax implications of the sale of shares in a special purpose vehicle

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 generally exempt from VAT.

However, this exemption does not apply in certain cases specified in the statute. The aim is to exclude from VAT exemption a fictitious sale of shares, which in fact consists in 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 this 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. The market value most often does not correspond to the nominal value. Sometimes it does not even correspond to the purchase price.

To determine the market value of a company being acquired, it is sometimes safer to retain an auditor. In practice, there are two approaches to company valuation:

- the asset-based method, (typically the adjusted net asset method), relies, in simple terms, on the value of the company's assets;
- the discounted cash flow method consists, in simple terms, in estimating the cash flows which the company will be able to generate within a certain timeframe.

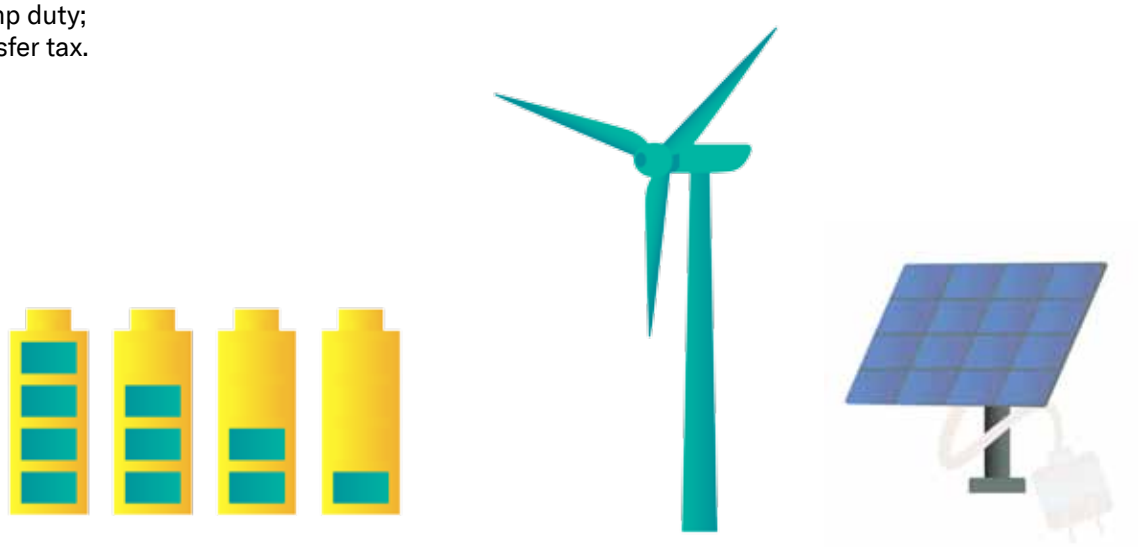
SPVs, which are usually new entities without substantial assets, should be valued using the latter method.

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 all other costs without which the acquisition of shares would not be possible are tax-deductible. An example may be:

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



3.5 Tax implications of the sale of projects

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 assets. The initial value of a tangible asset is the cost of own production.

The value of a produced tangible asset includes all costs incurred from the moment the project is commenced until the tangible asset is brought into service.

The purchase price is reduced by VAT, except where the taxpayer is not entitled to deduct it.

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Rödl & Partner has been supporting investors from the renewable energy sector for years. Our renewable energy experts form an interdisciplinary team of well-qualified lawyers and attorneys at law, tax advisers, accountants, EU fund specialists, all of whom have great specialist expertise and excellent, well-founded knowledge of the power industry. We have unrivalled experience in comprehensive advisory services for foreign enterprises starting their activity in the Polish market, as well as family-owned businesses at every stage of their projects.

We provide services concerning renewable energy in the following areas:

- DUE DILIGENCE;
- TRANSACTION DOCUMENTS;
- INVESTMENT PROCESS;
- ONGOING LEGAL AND TAX ADVICE AND FINANCIAL ACCOUNTING AFTER PROJECT CLOSING;
- GRANTS AND SUBSIDIES.