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The Government: it is not the State Treasury that should be a party to disputes with wind farms

Is a subsidiary a rightful player
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Foreign investors accuse Poland of cutting down the wind farm industry and demand billions of compensation. The State Treasury says that the contracts were not executed by them, but by small limited liability companies. And it is from them that the investors should demand money. Is it really so...

The biggest guns against Poland were called in by Invenergy. The Americans have already filed four lawsuits against Tauron, controlled by the State Treasury, before Polish courts in which they demand 1.2 billion PLN. Additionally, pursuant to agreements on mutual protection of investments (the so-called BIT agreements), they demand 2.5 billion PLN of compensation from Poland – the dispute will be settled by an international arbitration tribunal.

The experts we talked to claim that the American company has a good chance of winning. Although not as much as it is demanding.

The source of dispute

It all began in 2005. Since then, Invenergy invested approximately 2.2 bln PLN in Poland in projects connected to wind energy. In 2010, its subsidiaries signed large agreements with Polska Energia – Pierwsza Kompania Handlowa Sp. z o.o. (PE-PKH). In fact, however, negotiations were conducted between Invenergy and Tauron, which controlled PE-PKH. In the renewable energy industry it is not surprising that one entity negotiates the contract and another signs it. Problems came up in the following years. The prices of green certificate have fallen drastically. What contributed to the collapse were, among others, an oversupply of certificates on the market resulting from not only a significant increase in the number of wind farms in Poland, but also from changes in the law that allowed into the production of green certificates so-called co-firing, that is the simultaneous firing of biomass and coal. PE-PKH called on its partners, including Invenergy, to renegotiate contracts, invoking adaptation clauses in the contracts. These clauses provided for the obligation to commence talks in case of changes in the law. However, the American Invenergy did not agree to renegotiate. In the company's opinion, PE-PKH wanted to use the changes in regulations to make the executed contracts more beneficial for itself.

In March 2015, the subsidiary of Tauron decided to terminate contracts executed with wind farms. Invenergy's representatives consider this a scandal. Making use of adaptation clauses to change the contracts and to break them is what they consider an unacceptable trick. They also add that investments in Poland would never have been made if the Americans knew that regulations would be adopted in the future that would be unfavorable to the industry.

A business puzzle

Plans to sue Poland on the basis of BIT agreements were announced not only by the Americans, but also – although, for now, off the record – by entrepreneurs from other countries. A lot was invested in wind energy in Poland for instance by Germany. For the majority of investments, the principle was similar: the State Treasury, or even large energy companies, did not directly sign the contracts from the Polish side. Small special purpose vehicles enjoying the recognition of foreign partners executed the contracts because the partners saw the entire state apparatus behind them. Only does it mean that now, in the face of disputes, Poland should be a party?

"The Polish government is not a party to the contracts. The dispute concerns relations between commercial law companies. A direct interference of the State Treasury in the operational activities of the entities of that type would be unlawful. Invenergy's allegations are groundless" – stated the Ministry of Energy in response to the information of the Americans making use of the BIT agreement to file a lawsuit against Poland. In response to DGP's questions, the Chancellery of the Prime Minister is speaking in a similar tone. It distances itself from the case and argues that the conflict arose between commercial law companies and does not concern the quality of the protection of foreign investment in Poland.

Invenergy, in turn, considers it absurd to demand a compensation of 2.5 bln PLN from a small limited liability company that, in addition, was supposed to be liquidated. And the decision to liquidate it, as the Americans claim, was made by the mighty Tauron which considered that the purpose of the company's existence (that is execution of a contract with investors, and then a change to the detriment of the partner) has already been achieved. Only that the decision to liquidate PE-PKH was reversed by Tauron in 2017.

Who is right?

The experts we speak with reserve anonymity. There are few investment arbitration specialists in Poland and the vast majority are associated with large law firms. Therefore, it may happen that the law firm serves or served or would like to serve one of the parties to the conflict: the Polish government or a foreign entrepreneur from the wind industry.

"In my opinion, Invenergy's calculations are absurd. I see no grounds for the Americans to receive 2.5 bln as a result of the proceedings before the tribunal, and more than a billion before a Polish common court. The Americans are yet to provide credible documents which would prove that they suffered such damages as a result of entry into force of the law on renewable energy sources (RES) and as a result of actions of the companies owned by the State Treasury," one of the lawyers explains. At the same time, he reserves that the amount of the claim is one thing, and its legitimacy is another. "I have no doubts that the legislator in Poland adopted regulations which were extremely unfavorable to a particular industry. In investment arbitration, such cases are usually adjudicated for the benefit of the entrepreneurs. Because if a state encourages investors to invest, loyalty should not let it cut them down afterwards," an expert says. He adds that the statement of the law firm representing Tauron is naive.

Let's recall: recently in our newspaper Aleksander Galos, Legal Counselor from Kochański, Zięba and Partners law firm which represents Tauron, stated that, "when an investor considers his interests in a particular country to be infringed, they must prove, not only subjectively, but also objectively, that a country harmed them and it is the country that is responsible" and that "in the case with Invenergy, neither the Polish state nor even Tauron are parties to the dispute, but its company, PKH. The investor would have to prove that Tauron acted like "an arm of the Polish authorities", following its instructions, and that was not the case".

Attorney Galos also indicated that every entrepreneur must be aware of business risks. And one of the main risks is the change of existing regulations. "Practice shows that governments, of course, can change the law in a way unfavorable to investors. Then, however, they would have to pay them for it," responds our source. In his opinion, it may also be important that even the Polish Supreme Court considers actions of entities associated with the State Treasury against investors to be inappropriate. In the judgment of September 16, 2016 (case number IV CSK 751/15), the Supreme Court suggested, for instance, that actions towards investors were based on seeking pretexts for a unilateral termination of the framework contracts for sale, while there was no significant cause in the light of the interest of both parties to the contract that would speak for such a solution.

Statement of the Chancellery of the Prime Minister

The dispute between commercial law companies is a contractual dispute and does not concern the quality of protection of foreign investments in Poland. In light of the above, the resulting dispute should be treated as a result of diversified assessments of the property interests of the parties that have executed contracts, and should be resolved by common courts in currently pending proceedings. All issues should therefore be considered at the level of the parties to the contracts, and not through the State Treasury.

All organizational units of the Treasury are bound by the constitutional principle of legalism, which provides that they can act only on the basis and within the limits of the law. No provision of currently binding law awards individual ministers a statutory competence to influence, directly or through other authorities or the administration, decisions taken by private law companies, regardless of the State Treasury's capital share in them. It should be emphasized that Polish legislative solutions in this respect correspond to the solutions adopted in the United States and the European Union.

In light of the above, the Department of the State Treasury would like to emphasize that the investments of entities with foreign capital were and are treated by the Polish state with respect for all rights provided for by the US Investment Treaty and are guaranteed protection of both legal and economic interests.

Taking a stand supporting any of the parties in the dispute would expose the Polish government to the allegation of violating the constitutional principle of legalism and the division of power. In any civil legal system, it is not the competence of the government to make such assessments, but only of independent and impartial courts.

What is the significance of the fact that the contract with the investor was executed by a small limited liability company? Another lawyer with several years of experience as an arbitrator ensures that it is rather insignificant. "If the entire industry knows how the contracts are executed, so do international arbitrators. International investment arbitration is much more formalized than many other proceedings based on out-of-court dispute resolution, but it has sufficient freedom in making decisions to deal with such cases," the expert explains. In his opinion, the argument that the Polish state was not a party to any agreements will be dismissed as a line of defense before the tribunal very quickly. "If it was not the case, no state would take any obligations on its shoulders. Everything would go through capital companies," we hear. At the same time, making the State Treasury liable for PE-PKH's activities will require an analysis of whether the Polish company was really established in order to execute contracts with investors. "The most important will be the assessment of its real dependence on the State Treasury. It can be a multidimentional relation, that is verification of the subordination of PE-PKH to Tauron, and

Tauron's – to the Treasury," explains the investment arbitration specialist. The easiest way to check it is through analysis of who has a real impact on staffing management. The industry in which a domestic company with multi-million contracts operates is also significant. "Life experience of the arbiters allows to assess whether a small entity can successfully operate in particular branches of the economy. It should rather be assumed that in the energy sector it would be extremely difficult, or even impossible," the lawyer declares.

In the context of risk, however, the question arises as to why energy concerns signed 15-year contracts, in which the price of certificates of energy origin was practically fixed.

"Long-term contracts contained so-called adaptation clauses, introducing the institution of the renegotiation of the terms of the agreement by the parties, in the event of a significant change in the law," says Daniel Iwan, spokesperson for Tauron.

There are more disputes

Since last year, the situation between energy companies and wind farms is very tense. Court disputes are pending not only with Western companies, but also in our Polish field. Two energy companies controlled by the State Treasury, PGE and Enea, are also arguing about green certificates. According to PGE, termination of green certificate agreements was executed in violation of the contractual terms.

● Energa: declaration of invalidity

In September 2017, Energa Obrót SA initiated 22 court proceedings against RES producers and banks (assignees) to declare the invalidity of contracts for the sale of green certificates. In response to DGP's questions, Energa informs that Energa Obrót SA has come to the conclusion that contracts for the purchase of green certificates are absolutely invalid, due to the fact that they were concluded in violation of the provisions of public procurement law. "This invalidity is of primary and objective character, and therefore is not dependent on the parties' decisions," we read in Energa's statement.

Court proceedings are pending. In almost every case, the defendants sued by Energa filed their responses to the lawsuits. Furthermore, defendants are submitting many motions to secure their claims [injunction requests] – so far some of them have been considered and dismissed.

Currently, Energa Obrót SA emphasizes that it is open to talks with wind farms and banks in order to settle disputes in a conclusive manner. Such is the procedure – it requires striving to achieve a settlement. Energa emphasizes, however, that its opinions have not changed and it still thinks that contracts are invalid, according to its lawyers. Will there be a settlement in the case? Our unofficial information shows that not in every case the talks are going in the right direction. An example can be the German company Nordex, which is a shareholder of C&C Wind, which in turn manages the Orla Wind Farm (37.5 MW of power built for approx. 270 million PLN, of which 90 million were provided by the European Bank for Reconstruction and Development). It is possible that Nordex will also try to find solutions on the international arena. On January 31, 2018 we wrote in DGP that because of this dispute, Poland did not succeed in its potential cooperation in the development of infrastructure for charging e-cars with the German side. A co-owner of Nordex is Susanne Klatten, one of the main shareholders of the BMW group. Her husband Jan Klatten (who also has shares in Nordex through Momentum fund, of which he is the head) invested in the American company of electric chargers Charge Point, which in cooperation with the Białystok-based company Electrum was to develop a network infrastructure for electromobility in Poland.

For now, Nordex did not take any action and did not answer our questions officially. Off the record, however, we hear that impaired business confidence cannot be easily rebuilt.

● PGE v Enea: termination

In October and November 2016, the companies PGE Górnictwo i Energetyka Konwencjonalna SA, PGE Energia Odnawialna SA and PGE Energia Natury PEW sp. z o.o. received a notification from Enea SA of the termination of long-term contracts for the sale of property rights resulting from certificates of origin of energy from renewable sources, that is the so-called green certificates.

Due to the fact that, according to the PGE Capital Group, the notifications of termination of contracts submitted by Enea SA were made in violation of the contractual conditions, as at the reporting date PGE reported receivables due to contractual penalties and compensation in the amount of 128 million PLN. At the same time, inventories of property rights initially valued in values resulting from the executed agreements, were covered by a write-down to market prices. In the opinion of the PGE Capital Group, a favorable resolution of the above disputes is more likely than an unfavorable one.

The estimated volume of green certificates covered by contracts with Enea is approximately 2662 thousand MWh. The above amount was calculated for the period from the date of termination to the end of the originally assumed period of their validity.

In addition, PGE Górnictwo i Energetyka Konwencjonalna SA, PGE Energia Odnawialna SA and PGE Energia Natury PEW sp. z o.o. brought actions against Enea for payment of receivables in the total amount of 47 million PLN due to invoices for the sale of property rights issued for the benefit of Enea on the basis of the contracts. As we were informed by PGE, Enea refused to pay the receivables, claiming that it effectively set these off against its own receivables from the Group's companies with regard to compensation calculated for the alleged damage arising from the failure of the companies to renegotiate the contract in a contractual manner. According to the Group's companies, the set-offs are ineffective because Enea's claims for compensation have never been incurred, and there are no grounds for recognizing the position of the Poznan group [Enea], according to which there were breaches of contractual terms by the [PGE] companies. The proceedings are pending, and further hearings were scheduled for April 2018. Enea did not respond to our questions concerning this Polish-Polish dispute.

Liquidation is meaningless

The question arises as to why Tauron decided to liquidate a subsidiary which executed the contracts? Could the liquidation of the company be an escape from liability? It is worth noting that Tauron initially decided to liquidate it. Now, however, it reminds us that liquidation was revoked.

Experts, however, believe that whether PE-PKH is in liquidation or operating its business is rather insignificant in the context of investment arbitration. It is namely obvious that foreign investors will not be able to enforce a multi-million compensation from a small limited liability company. For them, it is the State Treasury that must be obliged to pay.

"Without going into detail, there were cases in international arbitration tribunals in which the direct counterparty of an investor was an already non-existent company. This is not an obstacle to award damages," explains one of the lawyers. He adds that if it is true that all negotiations were carried out by the investor with Tauron, and only a different entity entered into

the contract, it will be easier for the investor to prove that in practice they communicated with the State Treasury, and not an independent entity.

At the same time, experts stipulate that much may depend on specific rules of conducting arbitration. As we learned from Invenergy, the dispute will go to the arbitration of the UN Commission on International Trade Law (UNCITRAL).

Is this a good or a bad thing? According to experts, this arbitration tribunal is quite conservative in determining the liability of the defendant states for damages. Which may slightly increase Poland's chances of winning the dispute.

"There are considerable differences in the procedures for arbitration tribunals. However, in general it can be said that the fact that it was a subsidiary of the Treasury that executed a contract will never release the latter from referring to the merits of the dispute. In other words, the representatives of the Treasury will not persuade the arbitrators that they are not a party to the proceedings," the expert explains.

OPINIONS OF REPRESENTATIVES OF THE ENERGY INDUSTRY

Filip Grzegorczyk - President of Tauron Polska Energia

The characteristic feature of a legal dispute is that it has that two sides and you have to try to calm it down. Regrettably, in this case, the other party aims to aggravate it.

Today, we are unable to evaluate if the amendment to the law on renewable energy sources will change anything in our approach to the points of dispute. Namely, these relate to the past, and the law is created for future actions.

The other party's claims have been calculated in a curious way, because they refer to the entire duration of the contracts for the purchase of green certificates. Assuming that the amendment would change the price level in the future, perhaps the other side could indeed change the way their claims are calculated. This, however, is only a forecast.

Invenergy's argumentation in the case of this dispute is wrong, also in the context of international arbitration. Even if the State Treasury has 100% shares in a company, it should be remembered that it is a separate legal entity. Strictly speaking, one of the provisions of the Civil Code clearly indicates that it is the State Treasury and other entities invoked in the law which are legal entities. A company of the State Treasury cannot be treated as the State Treasury itself. From the legal point of view, such transfer of liability is incorrect.

Do we talk with Invenergy as Tauron? Yes, in the proceedings brought against us by this American company. But I am not allowed to speak about the proceedings, because the court has closed the trial to the public. These proceedings have no legal basis, because Tauron was not and is not a party to the contracts with the wind farm owners.

We are waiting for decisions in proceedings between our subsidiary PE-PKH and their subsidiary. However, I would like to emphasize that Invenergy did not invest directly in wind farms in Poland, but only through its subsidiaries. Which is exactly what Tauron did as well.

Just like every other stock-listed company, Tauron must act in the interest of its shareholders, including foreign financial investors. For this reason, it cannot overtake the business risks of

neither the wind farms nor its subsidiary, which is by definition limited to the assets of the subsidiary.

The contracts were signed by the subsidiaries. Neither Tauron nor Invenergy gave their subsidiaries any guarantees. Neither party promised the other that such guarantees would be given. We did it exactly symmetrically, and today Invenergy denies the consequences of the model to which it agreed. On the other hand, investors will certainly receive less detailed information allowing them to make a fully-informed decision on the investment in securities of a given entity, which may constitute a source of threats. I assume, however, the information requirements, which will be set by the legislator for this category of offers, will focus on the most important information and risk factors, which are usually the main basis for the decision of the majority of investors. Ⓒ Ⓟ

Patrick Whitty – Director of Communications of Invenergy LLC

Tauron caused that its subsidiary, PE-PKH, was involved in a number of unlawful and unethical activities that ultimately led to the breach of contracts for the purchase of green certificates. In this way PE-PKH committed unlawful acts, for which Tauron is directly liable. PE-PKH operates under Tauron's direction, and ultimately one of the Polish government, which was the owner of Tauron when the contracts were executed in March 2010. Today, it still effectively appoints the supervisory boards. Statements of Tauron, that is of the Polish government, that PE-PKH is an independently operating entity, is a complete fiction.

Poland executed long-term energy contracts with Invenergy to meet its needs in the field of renewable energy. After Invenergy constructed facilities to generate energy from renewable sources, Poland organized a series of coordinated actions, including giving a green light to state-owned companies to terminate contracts. And introduction of significant changes in regulations caused serious harm to Invenergy's investments in Poland. International arbitration is therefore the appropriate avenue for Invenergy's problems to be remedied.

Tauron never applied its adaptation clauses in the contracts properly. On the contrary, it was Tauron that refused to talk honestly and used a series of tricks instead, aimed at walking away from the long-term obligations of the Tauron Group. ⒸⓅ

Stanisław Popów - C&C Wind

The lawsuit of Energa Obrót SA against C&C Wind Sp. z o.o. is being processed by the Court of Arbitration at the Polish Chamber of Commerce. In February there was one meeting establishing the framework for further action. Because of the need for confidentiality, I cannot answer questions about possible negotiations. The press reported that there were talks with some of the banks that were co-defendants. For several months, the company has been negotiating with banks the principles of adapting the provisions of the credit agreement to the current market conditions.

In the current context of dynamic changes in the environment of wind farms (legislative issues, counterparties' activities, etc.), it is crucial to reach an agreement with banks to make such changes to the provisions of credit agreements that would allow long-term operation on the current binding conditions. In our opinion, it is possible if we assume a gradual return from the current collapse caused by the so-called lex Energa.

Recent news published by the Ministry of Energy [amendment to the RES Law – ed.] allow for very cautious optimism. The amendment must, however, go through the entire legislative path,

which may involve changes in its contents. The modification in question does not address, however, the biggest problem for the future of wind farms, that is lex Energa. The current level of substitution fee to which the majority of contracts for the purchase of green certificates are indexed, does not allow for sustainability of already operating farms. The amendment also does not provide a practical resolution of the problem of a huge surplus of green certificates, which causes the prices to remain at a low level. ©℗

Adam Kasprzyk - spokesperson of Energa

Energa Obrót SA is currently conducting settlement talks with some counterparties – wind farms, against which it initiated court proceedings to declare the non-existence of legal relations resulting from the certificate purchase agreements (CPA). Some of the talks are at a very advanced stage. We are observing a positive change in attitude of our counterparties who approach the common problem in a constructive spirit. It is worth noting that Energa, in the context of disputes initiated against wind farms, bases its argumentation largely on the pro-EU interpretation of the provisions.

In addition, in the context of disputes that Energa has brought against investors with foreign capital, it is worth mentioning the latest judgment of the Court of Justice of the European Union, issued in the case of Achmea. The ECJ recognized the ISDS mechanism contained in agreements on the protection of mutual investments, allowing foreign investors to sue states for decisions unfavorable to them, as incompatible with EU law. This judgment is a confirmation of the principle of the autonomy of EU law. ©℗

Maciej Szczepaniuk - spokesperson of PGE

Enea claimed that the companies PGE Górnictwo i Energetyka Konwencjonalna SA, PGE Energia Odnawialna SA and PGE Energia Natury PEW Sp. z o. o. seriously violated the provisions of contracts for the purchase of green certificates. They did not renegotiate the provisions of the contracts under the contractual procedure in accordance with the adaptation clause, which Enea asked for in July 2015 in connection with the alleged change in regulations affecting the performance of these contracts. According to PGE, notifications of termination of contracts submitted by Enea were filed in violation of the contractual conditions. The companies have taken appropriate steps to assert their rights. Due to the fact that Enea refused to perform its long-term agreements, they filed a motion for payment of contractual penalties against it, and PGE Energia Odnawialna demanded payment of compensation for damages suffered as a result. In light of the refusal to pay these receivables, the companies intend to claim their payment by means of court proceedings. In the proceedings initiated by PGE Energia Natury PEW Sp. z o.o. for payment, the District Court in Poznań IX Commercial Division acknowledged the claim in its entirety and issued an order for payment in the writ-of-payment proceedings. As a result of the cross-motion filed by Enea, the order for payment has lost its power by virtue of law. The case is still pending and the next hearing was scheduled for April 2018. ©℗

A drastic decline in value

The price of green certificates is the source of the conflict. 300 PLN – such was their value when the companies executed the contracts. After the market collapse, their price was only 24.38 PLN.

Green certificates are special property rights for the producers of energy from RES, including wind farms, whose sales are to support the development of renewable energy in Poland. The law imposes an obligation on some entities to purchase a certain amount of green certificates.

Pursuant to Article 52 section 1 of the Law of February 20, 2015 on renewable energy sources (Journal of Laws of 2017, item 1148, as amended), among others, energy suppliers to end consumers, that is the largest energy companies (State Treasury companies: Energa, Enea, Tauron, PGE), are obliged to do so. In other words, energy companies producing energy mainly from coal are obliged to purchase the certificates in order to in a way balance the generation of "dirty" energy.

Certificates can be purchased on the market, but you can also execute a contract to purchase them directly from companies. Many energy companies and companies who represent them opted for the second solution.

Contract this, the market that

When, however, energy companies executed contracts with companies who owned wind farms several years ago, the prices of green certificates on the market were very high. It happened that they were almost as much as 300 PLN/MWh. The companies executed contracts for many years – often 15, as was the case with Tauron's subsidiary. Prices in these contracts were set based on the amount of the substitution fee (an alternative fee for those who resign from the purchase of certificates on the market; in 2010, it was 267.95 PLN, so it was close to the price of certificates, then in subsequent years it reached 300 PLN), and the leeway for change was quite narrow. Back then it was believed, however, that the market of green certificates would work properly.

The thing is, it didn't. From the beginning of January 2010 to the end of December 2015, the market price of green certificates decreased from approximately 274 PLN/MWh to 116 PLN/MWh. With time, this collapse on the market deepened even more – in June 2017, the average monthly price of a green certificate reached its minimum level of approximately 24 PLN!

The companies found themselves in a difficult situation: by paying according to the rates set in the contracts, they would have to pay rates which were many times higher than the market prices.

Changes in the law

What was the reason for such a dramatic fall in prices? According to experts, but also to companies themselves, it was among others, the oversupply of green certificates on the market and changes in the law that contributed to the collapse.

First, at the end of December 2012, regulation of the Minister of Economy from October 18, 2012 on the detailed scope of the responsibilities to obtain and present for redemption the certificates of origin, the substitution fee, purchase of electricity and heat generated in renewable sources of energy and the obligation to confirm data concerning the amount of electricity generated in a renewable energy source (Journal of Laws, item 1229) entered into force. Among others, it facilitated and significantly increased the production of electricity in biomass sources, among others due to the relaxation of the limits of the share of agricultural biomass burned in installations generating energy from reproducible sources. There was also a further increase in generation in sources co-firing biomass with coal. As a result, there was a situation in which the supply of green certificates permanently exceeded domestic demand, and this affected the collapse of the price level of certificates of origin, the value of which dropped dramatically.

Then in 2015, the RES Law was amended. The changes in law did not, however, slow down the collapse. In fact it fixed the price of the substitution fee by setting it at 300.03 PLN, but back then the prices of green certificates were already almost two times lower.

In Tauron's opinion, instead of helping, the draft accelerated the drop in prices. "In the second half of 2016, you can even speak of a total collapse of the market, which is a consequence of legal changes which took place in 2012 and 2015 and occurred in 2016 and 2017," Tauron wrote in its statement.

The prices of green certificates have been growing for several months, and currently they oscillate around 75 PLN. However, the problem of oversupply has still not been resolved (according to the original assumptions, the state was supposed to intervene in the case of oversupply by collecting the surplus from the market, but it did not happen in practice).

After the ECJ's judgment, the rules of EU battles change

Not only have the Americans announced a battle against Poland. Investors from several EU Member States, above all from Germany, also adopted an ominous look. Here, however, the mode of action will have to be completely different.

Strictly speaking, Poland does not have to fear international investment arbitration. Even if we do have a mutual agreement on the protection of investment signed with one of the EU states, by means of simplification it can be said that it is invalid. This is a result of the judgment of the EU Court of Justice of March 6, 2018 (case number C-284/16) in the case of Slowakische Republik against Achmea BV. In the judgment, the ECJ declared that the arbitration clause included in the agreement on mutual investment protection executed between the Netherlands and Slovakia is inconsistent with EU law. And the reason? "This provision excludes disputes which may concern the application or interpretation of EU law from the judicial review mechanism." In other words, it is the ECJ and national courts, which make use of the ECJ's jurisprudence, that have jurisdiction to settle disputes in the EU, and not arbitration tribunals.

The judges in Luxembourg observed in the judgment that according to BIT agreements, the arbitration court established under such an agreement is called to adjudicate on the basis of the applicable law of the contracting state concerned by the dispute, as well as all relevant agreements between the contracting parties. And in the light of EU law, it has primacy over national law while respecting its conditions.

The Court [ECJ] has therefore indicated that, concluding the BIT agreement, Slovakia and the Netherlands have established a dispute settlement mechanism that is not adequate to ensure that the above-mentioned disputes will be resolved by a court in the Union's judicial system, with a reservation that only such a court can ensure full effectiveness of the Union law. For this reason, it was adjudicated that an arbitration clause in the mutual protection agreement infringes EU law. And, as a result – that it should not be applied.

In practice, due to the judgment in the Slovakische Republik v. Achmea BV case it makes no sense for BIT contracts to exist between EU Member States. They should settle their disputes in national courts, and in case of difficulties – with the assistance of the ECJ.

European investors who would like to sue Poland should therefore take advantage of common courts, and not investment arbitration.

Will the amendment alleviate the disputes?

The difficult situation of green energy producers is to be improved by the latest draft amendment to the RES Law. Unfortunately, according to experts, it will not heal the market of green certificates.

On March 6, the government adopted the draft amendment to the law on renewable energy sources. Its objective: to improve relations (currently at their limits) between the state-owned energy companies and wind entrepreneurs. It is no secret that in this manner the government wants to discourage entrepreneurs from suing the Polish government in arbitration.

New regulations, as we read in their substantiation, "will contribute to the effective use of renewable energy sources, as well as increased use of energy by-products from agriculture and industry using agricultural raw materials". They are also intended to fulfill international obligations regarding the share of renewable energy in total energy consumption at the level of 15% by 2020.

What can we find in the draft?

● Regulations have been introduced to monitor and evaluate the development of distributed generation (in particular, energy production by RES micro-installations). As a result, monitoring of distributed generation will influence the evaluation of the RES 2020 target.

● Solutions to improve the functioning of the auction system in the energy industry were provided - it was adapted to the needs and capabilities of small energy producers, such as small hydropower plants and biogas installations. New "auctions baskets" were provided for the sale of electricity produced in the installations of renewable energy sources, for which the reference price is determined. At the same time, the catalog of renewable energy sources (for which reference prices are published) was extended to installations with a capacity of less than 500 kW, which will allow to be considered the specificity of the competitiveness of renewable energy technology.

● New support mechanisms have been proposed for small electricity producers from renewable energy sources (installations with the capacity of up to 500 kW and from 500 kW to 1 MW of installed electric capacity) for selected technologies (small hydropower and biogas), the funding of which will be provided outside the auction system.

● A new settlementsmechanism was introduced, assuming that unused electricity will be purchased at a guaranteed price. The fixed purchase price is to constitute 90% of the reference price for a given type of installation and will be indexed each year according to an average annual price index of goods and services for the previous calendar year. This solution is to contribute to the development of RES installations with low capacities that would not be able to compete in the auction system.

● It was proposed that the existing building permits for wind power plants will retain validity as long as within 5 years – from July 2016, that is the date of entry into force of the law on investments in the wind generators – a use permit is issued.

EXPERT'S OPINION

The draft amendment to the RES Law contains proposals partly responding to the demands formulated for nearly two years by the renewable energy industry in Poland. Introduction of the system of guaranteed tariffs for installations with a capacity of less than 1 MW and unlocking auctions, in which it is estimated that over 2 GW of new capacity will be contracted, can, at least

theoretically, ensure stable conditions for financing new projects, which in turn may encourage entrepreneurs to invest further. Whether it will indeed happen and weakened investor confidence in the state returns – only auction's results will show.

The proposal to return to the previous property tax calculation rules for wind power plants which in 2016 was increased three, four times is a change expected by the wind industry. This further exacerbated the lack of profitability of most wind installations, the primary cause of which was the repeated fall in value of the certificates in the years 2013-2017. In 2017, tax charges increased to an average of 45-50 PLN/MWh, with an average annual price of the certificates of 39 PLN/MWh. The return to the rules which were in force before 2017 removes discrimination against the wind industry in this regard. No other source of energy is subject to a similar tax.

However, what the draft is still missing is a reform of the system of green certificates which is used by generation units producing more than 95% of renewable energy with a total capacity of more than 7.5 GW. There are also no plans to transfer some of the existing installations to the auctions system which was signaled during consultations and which would reduce the oversupply of the certificates. As a result, new installations constructed in years 2007-2016, which received no investment support (approximately 70% of the existing potential), will still struggle with the lack of income which they don't even have enough to cover their credit obligations, much less to cover the cost of current operational activity. Both future investors and financing institutions who are observing this dramatic situation cannot ignore it when calculating the risks associated with the implementation of new projects in the RES industry. Among others, this is confirmed by the Polish Banking Association, which in its statement from February 28, 2018 clearly indicated that the banks will not engage in new investments if the support system for already existing installations is not reinstated. ©℗

The industry: its too little

According to experts, the solutions proposed in the RES Law are a step in the right direction, but they will certainly not eliminate all of the problems between the energy companies and wind farms.

As noted by Beata Wiszniewska, General Director of the Polish Chamber of Commerce for Renewable and Distributed Energy, the reform of the green certificate system, which is used by generation units producing more than 95% of renewable energy, is still missing.

The industry, however, expects more reforms. "It seems to me than not all is lost in the future of onshore wind energy in Poland. If the government shows that it is ready for talks with the industry, the business never gets offended," Janusz Gajowiecki, President of Polish Wind Energy Association tells DGP. "The project of changes has to be a step towards the investors, however. At the moment the most important problems to be solved are the extension of validity of already issued building permits for more than three years, which may result in the construction of 2500-3000 MW of power, the question of the taxation of wind farms, that is the return to the state where the structure was considered to be its basis, and not the turbine as well. The third issue is a clear schedule of auctions [support system for green energy – ed.] for wind power," enumerates Gajowiecki.

But can the changes have any impact on the decisions to sue the government? This is the decision of the foreign investors, and in particular – their lawyers. ©℗