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Legal Analysis

The “Small Tri-pack” and the Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources

I. Scope of analysis

Subject

1. The Parliament is now (June 2013) working on the bill brought by Members of Parliament amending the Energy Law Act and certain other statutes (parliamentary paper no. 946) [hereinafter referred to as the “Small Tri-pack”].
2. As stated in the reasons for the bill, “The purpose of the amendments to the Energy Law Act is, in particular, to ensure full implementation of the Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC and to make complete the implementation of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55–93) and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94–136) [emphasis added by RR and MS]¹.
3. The Council of Ministers presented its position concerning the bill on 17 April 2013. First, the Government pointed out that the European Commission “has conducted a formal procedure since 27 January 2011 on the lack of transposition of Directive 2009/28/EC” and believed that “the bill will – the work of the Subcommittee included – enable to clarify the issues relating to the Commission’s assertions which have not been successfully clarified yet. Consequently, it should result in the Commission withdrawing its complaints [...] filed with the Court of Justice of the European Union [...]” In sum, the Council of Ministers stated that it “supports the solutions proposed in the members of parliament’s [...] bill [and to] the extent arising from the obligation to implement Directive 2009/28/EC, the Council of Ministers will submit a separate draft regulation in relation to those matters.”

¹ See Parliamentary paper no. 946, Sejm [lower chamber of parliament] of the Republic of Poland, 7th term of office, p. 41.

4. However, The Government's position did not include significant information that the formal proceedings, which had been initiated on 27 January 2011, were concluded by the Commission on 21 March 2013, when it referred Poland to the CJEU for "failing to transpose" the Renewable Energy Directive². The content of the Commission's action is not publicly available.

5. The time limit for Member States of the European Union to transpose Directive 2009/28/EC (hereinafter referred to as the "RES Directive")³ began to run from the day the Directive entered into force (25 June 2009). The time limit expired on 5 December 2010 (Article 27(1) and Article 28 of the RES Directive).

6. The daily penalty demanded by the Commission is 133,228.80 EUR. With the current exchange rate, this comes to around 200 million PLN for each year without transposition.

7. Therefore, this Analysis covers the "Small Tri-pack", the RES Directive, and the Commission's main arguments in its action against Poland before the Court of Justice of the European Union ("CJEU") concerning the non-transposition of the RES Directive into Poland's national law.

8. The scope of the RES Directive includes not only the share of energy from renewable sources in the production of electricity, but also in heating and cooling, and in transport. This analysis will be concerned solely with electricity⁴.

Purpose

9. There are serious doubts as to the compliance of the Small Tri-pack with the RES Directive, especially with regards to the requirement to ensure "full implementation of the provisions" of the Directive. Therefore, the purpose of this analysis is to answer the question whether the Small Tri-pack fully and properly transposes the RES Directive into Polish law.

10. The main fact to be considered in this context is the foregoing action by the Commission before CJEU. As rightly pointed out by the Council of Ministers in its position of 17 April 2013, it is possible for the Commission to withdraw its action. However, this would need to entail a "full implementation" of the RES Directive. Given the concerns that the Small Tri-pack has raised in this respect, the question to be answered is whether the enactment of the Small Tri-pack is likely to remove the substantive grounds for the Commission's action against Poland.

11. Accordingly, if the solutions provided in the Small Tri-pack are wrong or changes are not introduced to ensure appropriate transposition of the Directive, the Commission may not withdraw its action against Poland, resulting in a very high likelihood of financial penalties being imposed on the Republic of Poland.⁵

² See Press release of the European Commission of 21 March 2013 available at: http://europa.eu/rapid/press-release_IP-13-259_pl.htm.

See L.Kramer, EU Environmental Law, Seventh Edition, Sweet & Maxwell, 2011 pp. 319-323; M.Nowacki, Prawne aspekty bezpieczeństwa energetycznego w UE [*Legal aspects of energy security in the EU*], Wolters Kluwer 2010, pp. 335-339, pp. 345-347; M. Górską, T.Krzywicki, Wspieranie odnawialnych źródeł energii [*Promoting renewable sources of energy*] [in:] M.Wierzbowski, R.Stankiewicz (ed.) Współczesne problemy prawa energetycznego [*Contemporary problems of energy law*], Lexis Nexis, Warsaw 2010, pp. 183-195.

⁴ As far as transport is concerned the Directive is, contrary to the stated reasons for the bill, to be implemented through the amendment of the Biocomponents and Liquid Biofuels Act of 25 August 2006. The bill is yet to be presented to the Council of Ministers by the Ministry of Economy.

⁵ On sanctions for failure to implement directives see L.Kramer, EU Environmental..., pp. 391-416; Jan.J.Jans, H.H.B.Vedder, European Environmental Law, 3rd Edition, Europa Law Publishing, pp. 127-163.

Transposition, implementation and achievement of the effect /result prescribed in the RES Directive⁶

12. For the purposes of this analysis, it is necessary to identify how the RES Directive is to be realised in Polish law using established and consistent terminology. Several terms are used in the public debate, which often overlap. We will be using established and consistent legal language in this review⁷.

13. Firstly, we should define the terms 'implementation', and 'achievement of the result prescribed by the Directive'. B. Kurcz introduces the concept of implementation in the broad sense, which is best described as "all the activities which member states must take in order to fulfil the obligation imposed by the treaty, so that they can achieve the result prescribed by the directive within the required time."⁸

14. The most prominent part of the implementation process is the date on which implementation is accomplished since, upon its expiry, "the addressee of the rules laid down in directives is changed [...] These rules, which are initially addressed to member states and binding upon them, should, after the prescribed time period has expired, be addressed to all entities – *erga omnes* – in the national legal system [...] rules provided in directives should become binding "for" member states rather than "in" member states."⁹

15. It is also important to establish the very legal status of the deadline for implementation, which is set by directives themselves. It draws the dividing line between the "stage of implementation in the broad sense and the stage of actually implementing the directive, and defines the moment from which the state becomes responsible for compliance of the legal and actual situation with the directive"¹⁰. At this point, the directive should not only be at a stage of implementation, but this should be evident through the clear demonstration that implementation measures required by the directive are being carried out.

16. In the broadest sense, there are three stages of implementation:¹¹

a. Transposition (formal implementation);

Transposition of a directive "involves 'transposing', or, to put it differently, 'transferring' rules of directives into the rules of national law."¹² Since directives may include solutions for their application, "transposition will most often be only a part of the entire implementation process."¹³ According to such terminology, transposition is only the process of laying down the law, i.e. "creating new rules of law (requirement in the positive sense) or amending or repealing any of the existing rules of national law which are contrary to the rules being transposed from directives (requirement in the negative sense)"¹⁴.

⁶ See B. Kurcz *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego [European Community Directives and their implementation into national law]*, Kraków 2004.

⁷ The terminological matrix used here is the one suggested by B. Kurcz *Dyrektywy...*, Kraków 2004, pp. 44-59.

⁸ B. Kurcz *Dyrektywy...*, p. 44. The author further points out that the implementation requirement "is about taking all the necessary measures to ensure the conditions for effective application of and compliance with EU law.

⁹ B. Kurcz *Dyrektywy...*, p. 44.

¹⁰ B. Kurcz *Dyrektywy...*, p. 44.

¹¹ B. Kurcz *Dyrektywy...*, p. 49.

¹² So in B. Kurcz *Dyrektywy...*, p. 53.

¹³ So in B. Kurcz *Dyrektywy...*, p. 53.

¹⁴ So in B. Kurcz *Dyrektywy...*, p. 53.

b. Notification to the Commission on undertaken implementing measures:

The relevant obligation is provided for in Article 27(2) of the RES Directive:

“Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.”

c. Practical (specific) implementation

Beyond formal “transposition”, implementation often includes the process of enacting internally binding law, taking administrative measures to oversee compliance (e.g., monitoring, inspection), and engagement in other organisational or technical activities (e.g., consultations, exchange of information), combined all of which enable the member state to fulfil its “obligation to implement the directive within the time period it prescribes”¹⁵.

17. The last and most important stage is when the directive achieves its result. How the expected result (and the way of achieving it) is defined depends on the type of directive.

18. There are three types of directives: 1) those that require “law-making activities in express terms”; 2) directives that “are binding in relation to generally defined objectives and leave a large margin of freedom to member states as to the choice of how they wish to implement them. In the case of the latter, it may happen that law-making may not be necessary if other measures taken within the existing statutory or constitutional framework ensure that the result prescribed by the directive is achieved”; 3) “the so-called technical directives which define the achievement of specific results in very precise terms”¹⁶.

19. The RES Directive could be considered a mix of each type of directive expressed above. It contains some elements that are characteristic of the first type, as it expressly provides for “law-making activities”, (e.g. in the first sentence of Article 4(1) “Each Member State shall adopt a national renewable energy action plan”). On the other hand, the mandatory national overall target for the share of energy from renewable sources in the gross final consumption in 2020 as provided for by Article 3 in conjunction with Annex I to the RES Directive is characteristic of the second type (i.e. those which are binding as regards the generally defined overall objective). Again, in the case of access to the grid governed by Article 16, the Directive is binding as to the effect of ensuring preferential access. On the other hand, the Directive's requirements concerning the need to introduce sustainability criteria for biomass used as biofuels and bioliquids (Article 17 et seq. of the Directive, and in particular Annex V to the Directive) may be considered to be characteristic of the “technical directives”.

20. Consequently, various measures need to be used in order to fully implement the RES Directive. Transposing the provisions of the Directive is the most important part of the implementation process. Appropriate and complete transposition merely provides a starting point for ensuring that other aspects of the implementation process are done properly.

Objectives and effects of the RES Directive

21. Full implementation is not only about introducing appropriate national laws. It is also about ensuring that the law meets the Directive's fundamental objectives, which go beyond merely promoting the use of energy from renewable sources. In accordance with (1)-(5) of the preamble to the RES Directive, implementation of the Directive into national law should contribute towards:

¹⁵ So in B. Kurcz Dyrektywy..., p. 58.

¹⁶ B. Kurcz Dyrektywy..., p. 52.

- a. increased energy security of EU Member States by reducing the dependence on energy imports;
- b. more decentralised energy production, which through the use of local energy sources should result in increased local security of energy supply, shorter transport distances, and reduced energy transmission losses;
- c. providing opportunities for employment and regional development, especially in rural and isolated areas. With decentralised energy production from RES, support for the development and cohesion of local communities would result from ensuring sources of income locally and creating jobs at the local level;
- d. promoting technological development and innovation; and
- e. reducing greenhouse gas emissions, which will allow the entire European Union to comply with its commitments under the Kyoto Protocol.

22. In the case of the RES Directive, achieving the desired effect of the directive are achieved through:

- a. introduction of national, legal, and political measures required or provided for by the Directive to accomplish the Directive's objectives as set forth in its preamble (see point 21 of the analysis);
- b. Poland achieving the national target for the share of renewables in energy production in 2020; and
- c. fulfilment of the target of 15% share of renewable energy sources in terms of overall energy production.

RES Directive implementation status

23. The deadline for Member States to transpose the RES Directive expired on 5 December 2010.

24. Partial implementation of the RES Directive is ensured by the fact that it gradually replaces¹⁷ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market,¹⁸ which Poland implemented through the Energy Law Act of 10 April 1997, among other laws¹⁹. The solutions adopted in the RES Directive provide a continuation of Directive 2001/77/EC and, in accordance with (7) of the preamble to the RES Directive, the same or similar definitions were used in the interests of legal certainty. This explains why the national measures adopted so far to implement the Directive 2001/77/EC it are now, partly, no longer compatible with those provided for in the RES Directive.

25. With regard to the legal regulations concerning electricity, it is not possible to identify applicable laws which would bring Polish law in line with the new requirements of the RES Directive.

26. Given the failure to transpose the RES Directive into the national law, the European Commission brought an action against Poland to the Court of Justice of the European Union on

¹⁷ See in this context Article 26 of Directive 2009/28/EC which includes the relevant "intertemporal" provisions regulating the passage from the old rules to the new.

¹⁸ OJ L 283 p. 33.

¹⁹ Journal of Laws of 2012, No. 0, item 1059 as amended.

21 March 2013.²⁰ The daily penalty demanded by the Commission is 133,228.80 EUR, and with the current exchange rate this equates to around 200 million PLN annually. Currently, the content of the Commission's action is not publicly available.

II. Analysis and assessment of Small Tri-pack solutions

Introduction

27. Provisions of the RES Directive that are not properly reflected by the Small Tri-pack include, in particular:

- (i) ensuring priority access to the grid for renewable sources; and
- (ii) removing administrative barriers to renewable energy sources being installed.

1. Priority access of RES to the grids

Provisions contained in the RES Directive

28. Providing priority access to the grid for renewable sources of energy shall ensure, in compliance with the Directive's objectives, that electricity from renewable energy sources can be sold and transmitted "at all times"²¹. The RES Directive also requires Member States to design their national legal frameworks in such a way as to ensure that new installations generating electricity from renewable energy sources are integrated into the grid as fast as possible²².

29. Furthermore, the costs of connecting new installations to the grid "should be objective, transparent and non-discriminatory", and those costs should take into account the benefits that new producers of electricity bring to the grid²³. Given the dispersed nature of sources and, generally, their smaller size, it translates to a higher grid stability and significantly lower costs of supplying electricity because of lower transmission losses, and frequently also the direct use of the low-voltage grid. In the case of peripheral regions, or regions with low population density, connection costs for producers of electricity from renewable sources should be "reasonable" in order to ensure that they are not put in an unfavourable situation compared to producers situated in more central, industrialised and densely populated areas²⁴.

30. The RES Directive provides that the establishment of priority access of renewable sources of energy to the grid is important for integrating renewable energy sources into the internal market in electricity which is being created.²⁵ Moreover, these solutions are in line with the rules for internal market in electricity provided for in Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC²⁶.

²⁰ See Press release of the European Commission of 21 March 2013: http://europa.eu/rapid/press-release_IP-13-259_pl.htm [accessed on 18.06.2013]

²¹ See (60) of the RES Directive preamble.

²² See at the end of (61) of the RES Directive preamble.

²³ See (62) of the RES Directive preamble.

²⁴ See (63) of the RES Directive preamble.

²⁵ See (60) of the RES Directive preamble.

²⁶ OJ L 176 p. 37.

31. Regarding priority access, the RES Directive includes a number of clearly defined measures and activities which Member States must introduce or undertake:

a. Guarantee the transmission and distribution of electricity produced from renewable energy sources

Under Article 16(2) (a) of the RES Directive, Member States shall ensure that transmission system operators and distribution system operators within their jurisdiction guarantee the transmission and distribution of electricity produced from renewable energy sources. The only limitation in this respect relates to a requirement to maintain the reliability and safety of the grid, which is undoubtedly a requirement, in the positive sense, to be met by the state²⁷. In this regard, the national electricity market regulator has an obligation to exercise supervision in order to ensure that the "requirement to maintain the reliability and safety of the grid" is not abused by operators.

b. Priority access or guaranteed access to the grid-system of electricity produced from RES

Pursuant to Article 16(2) (b) of the RES Directive, Member States are obliged to provide renewable energy sources with either priority access or guaranteed access to the grid-system for electricity. This entails putting a system in place which guarantees that electricity produced from RES will always have access to the grid-system. The reservation from Article 16(2) of the RES Directive, just discussed above, also applies here.

c. Priority to RES installations when dispatching electricity generating installations

Article 16(2) (c) requires Member States to ensure that transmission system operators give priority to installations using renewable energy sources when dispatching electricity generating installations.. This requirement is supplemented by an obligation to also ensure secure operation of the national electricity system, and to apply transparent and non-discriminatory criteria.

At the same time, there is a positive requirement for member states to ensure that appropriate operational measures are taken in order to minimise the curtailment of electricity produced from renewable energy sources. The reservation from Article 16(2) of the RES Directive applies here as well.

d. Requirement to prevent inappropriate curtailments

According to Article 16(2)(c) *in fine* of the RES Directive, any curtailments with respect to the new RES capacity that can be connected to the national electricity system are considered as inappropriate. More specifically, if such curtailments arise, Member States shall ensure that system operators report on appropriate corrective measures. Accordingly, in the positive sense, Member States are obligated to requiring transmission system operators to ensure continuous access to transmission grids for renewable energy sources. The reservation from Article 16(2) of the RES Directive applies here too. The requirement to report on corrective measures very clearly shows that it is the operators' duty to maintain safety and reliability of the grid, and it may not be the reason to refuse connection to the grid.

e. Requirement to publish the rules relating to the bearing and sharing of RES grid connection costs

²⁷ Article 16(2) makes an appropriate reservation that the requirements "relating to the maintenance of the reliability and safety of the grid" prevail over the priority access as provided for in Article 16(2).

To ensure transparency in the process of connecting new RES sources to the grid, Article 16(3) of the Directive obligates Member States to require transmission system operators and distribution system operators to set up their rules relating to the bearing and sharing of the costs of technical adaptations of the grid. Examples of such measures provided in the Directive include grid connections and grid reinforcements, improved operation of the grid, and rules on the non-discriminatory implementation of grid codes.

In turn, Article 16(3) also establishes a requirement to ensure that connection conditions for renewable energy sources in peripheral regions and in regions of low population density are based on objective, transparent and non-discriminatory criteria, taking account of all the costs and benefits associated with the connection of such sources to the grid. Benefits include lower transmission costs resulting from reduced transmission losses, and smaller investment in infrastructure since such producers being connected to the grid are frequently low or medium voltage sources.

f. System operator participation in RES connection costs

Art. 16(6) of the RES Directive introduces the participation of transmission and distribution system operators in the costs of connecting RES to the grid by bearing such costs in full or in part. Member States are to regularly monitor the costs of connecting new RES capacity and shall take measures to improve the legislative frameworks for the bearing and sharing of those costs, with the first analysis to be conducted by 30 June 2011, and every two years thereafter.

This solution is specified in more precise terms by Article 16(6) of the RES Directive:

“The sharing of costs referred in paragraph 3 shall be enforced by a mechanism based on objective, transparent and non-discriminatory criteria taking into account the benefits which initially and subsequently connected producers as well as transmission system operators and distribution system operators derive from the connections”.

g. Information requirements for DSOs towards new RES

Furthermore, the RES Directive introduces new requirements for transmission and distribution system operators to provide information to new producers of energy from renewable sources wishing to be connected to the system. Under Article 5(a) – (c), information required, includes:

- a comprehensive and detailed estimate of the costs associated with the connection;
- a reasonable and precise timetable for receiving and processing the request for grid connection; and
- a reasonable indicative timetable for any proposed grid connection.

Under Article 16(5), the second sentence, of the RES Directive it is acceptable to introduce tenders for the connection work in the national system, the calls for such tenders to be issued by producers of electricity from RES planning to be connected to the grid.

h. Charging transmission and distribution tariffs

Article 16(7) of the RES Directive requires Member States to ensure that the charging of transmission and distribution tariffs does not discriminate against electricity from renewable energy sources. The level of transmission and distribution tariffs for such types of electricity is to reflect the benefits resulting from the connection of renewable energy sources, especially the direct use of low-voltage grid, which translates directly into low costs of using such grid. In particular, transmission and distribution tariffs are to ensure, as provided for in Article 16(7), that

there is no discrimination against electricity from renewable energy sources produced in peripheral regions, such as island regions, and in regions of low population density.

32. The standard laid down by the RES Directive is very clear: As a Member State of the European Union, Poland is required to ensure priority access for RES to the grid. Although this may be subject to curtailment due to grid safety considerations, such circumstances result in a new legal requirement for operators to take corrective measures in order to adjust the grid to its use by the new renewable sources of energy. This standard also means that the costs borne by new producers of electricity from renewable sources of energy who wish to be connected to the grid should be made lower by deducting the benefits of decentralised electricity production.

Existing regulations in Polish law

33. The rules under Article 16 of the RES Directive cover the following matters which are now regulated by Polish legislation, and more specifically in the Energy Law Act²⁸ of 10 April 1997: (i) obtaining grid connection conditions; (ii) concluding of a grid connection contract; and (iii) concluding of a contract for electricity transmission or distribution and a contract for the sale of electricity.²⁹

a. Obtaining grid connection conditions

34. No electricity production project where such electricity is to be supplied to the grid may go ahead without first obtaining the conditions for connection to the grid.

35. Pursuant to Art. 7.3a ELA, an entity seeking connection to the electricity grid must file the appropriate application to the grid operator. The content of the application and the necessary appendices are set out in detail in § 7 of the Minister of Economy Regulation of 4 May 2007 concerning detailed conditions for the operation of the electricity system ("Regulation")³⁰.

36. In relation to devices of the rated voltage higher than 1 kV, which are used to generate electricity and are connected directly to the grid, such devices may not be connected unless an expert study of their impact on the electricity system has been prepared. This does not apply to electricity generating units of the total installed capacity of no more than 2 MW or 5 MW, provided that the application is filed by the final customer. Preparation of such expert study is the duty of the electricity transmission or distribution undertaking, but the costs are then reflected in the actual connection expenditure and affect the amount of the connection charge.

37. The minimum content of connection conditions is set out in § 8 of the Regulation. The key regulation is provided in § 8.7 of the Regulation, which provides that conditions for connection shall remain valid for two years. During their validity period, conditions for connection are a type of conditional commitment on the part of the electricity undertaking to enter into a contract for connection to the network.

38. The time limits for issuing conditions for grid connection are provided in detail in § 9 of the Regulation. In the case of final customers applying for connection to the network of a rated voltage not higher than 1 kV, such time limit is 14 days from the filing of a complete application. The time limit for producers of electricity included in the same group is 30 days, and for applicants seeking connection to the network of a higher rated voltage, such time limit is between 60 and 90 days, depending on the group concerned.

²⁸ Hereinafter referred to as "ELA".

²⁹ See K.Strzyczkowski, *Prawo gospodarcze publiczne [Public commercial law]*, 6th Edition, LexisNexis, Warsaw 2011, pp. 545-626.

³⁰ Journal of Laws No. 93, item 623 as amended.

39. Regarding grid connection charges, under Art. 7.8.3 ELA, charges assessed by the network company charges for connection to the grid are based on the actual expenditure made to provide the connection to the grid. It is only for sources of renewable energy of an installed capacity not higher than 5 MW, and cogeneration units of an installed capacity below 1 MW, that the connection charge to be paid is a half of the one based on actual expenditure.

40. The level of possible necessary expenditure may be reflected by the amount of the advance payment by the applicant where the connection is to be to the network of a rated voltage above 1 kV. Such applicant makes an advance payment (on account of the later connection charge) of PLN 30 per each kilowatt of connection capacity as specified in the application for connection conditions (Art. 7.9a ELA).

b. Concluding grid connection contracts

41. Another part of the process is the need to enter into a contract for connection to the grid. Under Art. 7.1 ELA, a transmission or distribution undertaking is required to enter into a connection contract with applicants on equal treatment terms if there are technical and economic conditions in place for connection to the grid and supply of energy, and the applicant requesting to enter into the contract meets the conditions for connecting to the network and receiving electricity. If the electricity undertaking refuses to enter into a connection contract, it is required by Art. 7.1 ELA to notify the URE President and the interested entity in writing, stating its reasons.

42. The minimum content of the refusal to connect to the grid is set forth in Art. 7.2 ELA and includes: the time period for connection; the amount of the connection charge; the dividing boundary between the network owned by the electricity undertaking and the installation owned by the entity to be connected; the scope of work necessary to provide the connection; requirements for the location of the tariff metering system and its parameters; the terms on which the real property necessary to provide the connection is to be made available to the electricity undertaking; expected execution date of the contract under which energy will be supplied; the amount of energy to be received; connection capacity; liability of the parties for failure to meet contractual terms and conditions, including in particular for the delay in completion of works compared with the agreed dates; contract duration; and terms of termination.

43. The date on which a connection contract is made depends on the progress of negotiations with the network operator. Negotiations may take up to 2 years, as they are only limited by the validity period of connection conditions. Since Polish law does not specify the date by which negotiations should be completed, they may take long enough, and upon expiry of the validity period of conditions for connection the operator is no longer obliged to enter into a grid connection contract.

44. This regulation should be criticised for leaving too much discretion to the parties, especially to operators, and for failing to lay down any time limits for negotiations. It may make a connection unprofitable or totally impossible because of the expiry of the 2-year period. Therefore, the existing regulation under Polish law cannot be considered to meet the requirement to ensure "guaranteed access to the grid-system of electricity [*produced from renewable energy sources*]" pursuant to Article 16(2) point (b) of the RES Directive.

c. Refusal to enter into a grid connection contract

45. As a separate matter, we will now discuss under what conditions the operator can legally refuse to enter into a grid connection contract.

46. A transmission or distribution undertaking is required under Art. 7.1 ELA to enter into a grid connection contract with applicants on equal treatment terms if there are technical and economic conditions in place for connection to the grid and supply of energy, and the applicant requesting to enter into the contract meets the conditions for connecting to the grid and receiving electricity.

47. Such regulation is clearly not compliant with the RES Directive. First and foremost, Article 16(2)(b) and (c) of the RES Directive only contains one exception to the requirement to ensure priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources – that of the obligation to maintain the “reliability and safety of the grid.” In contrast, Art. 7.1 ELA provides that access may be refused if the technical or economic conditions are not there, for which there is no substantiation whatsoever in the RES Directive.

48. At the same time, Art. 7.9 ELA provides that where an electricity undertaking refuses network connection due to the lack of economic conditions, the undertaking may set such a charge for the grid connection as agreed with the applicant in the grid connection contract. Furthermore, the regulatory framework set forth in Art. 7.8 ELA, which defines the connection charge primarily in terms of the actual connection costs, does not apply to the process of determining the amount of the charge as aforesaid.

49. Consequently, Art. 7.9 ELA provides a legal opportunity for electricity undertakings to obtain a much higher charge than it would otherwise result from actual expenditure made to provide the connection.

50. When the provisions of Art. 7.9 ELA are assessed in the context of Article 16(3), Article 16(4) and Article 16(6) of the RES Directive, one is led to the conclusion that such provisions are clearly at variance with the text of the RES Directive. This is because they allow for determining the connection charge in a way which does not conform to the general rules after the electricity undertaking has found that there are no “economic conditions for grid connection”, for which there are no grounds under the RES Directive.

51. If the energy undertaking refuses to enter into a grid connection contract, it is required by Art. 7.1 ELA to notify the URE President³¹ and the interested entity in writing of such refusal, stating its reasons. However, it should clearly be pointed out that - especially in the case of final customers that are often non-professionals wishing to connect small sources - the prospects of a dispute before URE President against professionals (network operators) shows inequality between the parties in a dispute in which it is often practically impossible to demonstrate that there are technical or economic conditions for connection.

d. Concluding electricity transmission or distribution contracts

52. After a connection contract has been concluded performed, the next step is to enter into a contract with the distribution or transmission system operator. The minimum scope of the content of such a contract is set forth in Art. 5.2 ELA.

53. In the case of such a contract, the time limit for execution is stipulated in the grid connection contract which is concluded with the same entity, that is with the relevant operator. Such contract must be executed before selling electricity to customers. Operators charge for such a service according to their own tariffs.

e. Concluding of an electricity sale contract

54. The stage of obtaining access to the network is the execution of a contract for the sale of electricity. The minimum scope of the content of such a contract is set forth in Art. 5.2.1 ELA.

³¹ The President of Energy Regulatory Office in Poland.

55. The requirement to enter into such a contract in relation to electricity from renewable sources is provided in Art. 9a.6 ELA, under which the supplier of last resort shall purchase electricity generated from renewable sources of connected to the distribution grid or transmission grid located in the territory. This covers the area where such supplier operates and where such electricity is offered by a business entity that obtained a licence to produce it or was entered in the appropriate register.

Conclusions

56. Our analysis above clearly points the noncompliance of the existing Polish legislation with the RES Directive due to the failure to ensure priority access for electricity from renewable sources.

57. Although the requirement from the supplier of last resort to purchase electricity generated from renewable sources is guaranteed by Art. 9a.6 ELA, other legal provisions make it impossible to fully meet such a requirement because the possibilities for connecting new renewable sources of energy to the grid are very limited.

58. First, existing law not only fails to guarantee priority access to the grid for new renewable sources of energy, but it also restrains ordinary (non-priority) access by requiring "technical and economic conditions for connecting to the network and receiving electricity", while the RES Directive provides for no such conditions.

Solutions envisaged by the "Small Tri-pack"

59. The "Small Tri-pack" envisages several changes to the regulatory framework governing the access of renewables to the grid. These changes should be reviewed for their compliance with the RES Directive.

60. First, Art. 7.2 ELA will be amended and shall have the following content:

"2. The grid connection contract shall include at least provisions which set out: the time period for connection, amount of connection charge, the dividing boundary between the grid owned by the energy undertaking and the installation owned by the entity to be connected, scope of work necessary to provide the connection, requirements for the location of the tariff metering system and its parameters, the timetable for connection, the terms on which the applicant's real property is to be made available to the energy undertaking for the purposes of constructing or developing the network necessary to provide the connection, expected execution date of the contract under which gaseous fuels or energy will be supplied, amount of gaseous fuels or energy to be received, connection capacity, liability of the parties for failure to meet contractual terms and conditions, including in particular for the delay in completion of works compared with the agreed dates, contract duration and terms of termination".

61. The item which has been added by the "Small Tri-Pack" to the minimum content of connection contracts is the "roadmap for connection". This is definitely a positive development. However, it should be noted that the connection contract is not as problematic as the process of obtaining the conditions for connection, and negotiating the connection contract.

62. Another change in the "Small Tri-pack" will amend Art. 7.8.3 ELA that shall have the following content:

"3) there shall be a charge for connecting sources which cooperate with the grid and the networks of energy undertakings which carry out the business of

transmitting or distributing gaseous fuels or energy, such charge shall be based on the actual expenditure made to provide the connection, with the exception of

a) sources of renewable energy of an installed capacity not higher than 5 MW and cogeneration units of an installed capacity below 1 MW, for which the connection charge is a half of the charge based on actual expenditure;

b) micro installations for which there is no charge for connection to the distribution grid'.

63. The amendment to Art. 7.8.3 ELA specifically exempts only micro installations from the connection charge to the distribution network. This is a highly positive change, as it is in line with the RES Directive's requirement to take account of the benefits arising from decentralised systems of electricity production when deciding on the sharing of connection costs.

64. However, the "Small Tri-pack" largely maintains the existing cost sharing regime which, other than the new Art. 7.8.3 point a) ELA (a half-charge for RES up to 5 MW or up to 1 MW in cogeneration), does not provide any solutions to make the situation easier for new capacities being installed. This is where the cost sharing regime should, first, provide an exemption for all renewables to be connected to the low voltage grid. On the other hand, when connecting sources of renewable energy to the high voltage grid, the connection charge should be a half of that based on actual expenditure. This would provide appropriate incentives for investors, especially because renewable sources of energy, with their decentralised nature, can be located close to final customers in areas where electricity has so far been supplied mainly from other parts of the country. Where such sources are so introduced, this will result in higher grid stability, lower transmission losses, and reduced distribution costs.

65. Further, the "Small Tri-pack" adds a new paragraph 8d₂ in Art. 7 ELA which shall have the following content:

"8d₂. If an electricity undertaking engaged in the transmission or distribution of electricity refuses to connect a renewable source of energy for the reason of no technical conditions for the connection resulting from the lack of the necessary transmission capacity in the grid on the dates proposed by the applicant seeking the connection of a renewable source of energy, the electricity undertaking shall specify the planned time period and conditions for providing the necessary expansion or modernisation of the grid, as well as setting the dates of connection'.

66. This new provision in Art. 7.8d₂ ELA may be considered to meet the conditions of Art. 16(2) point (c) RES Directive. In particular, due to considerations relating to security of the national electricity system, and security of energy supply – which in this case can be considered as the lack of technical conditions for connection – corrective measures are taken *ex officio* which are aimed directly to "prevent inappropriate curtailments". What makes this proposal imperfect, however, is the fact that it does not specify the maximum period allowed for grid expansion and connection to the grid.

67. Another provision added to Art. 7 ELA is paragraph 8d₃ which reads as follows:

a. "8d₃. If technical or economic conditions are not in place for the connection of the capacity specified in the application for the conditions for connection of a renewable source of energy, the electricity undertaking engaged in the transmission or distribution of electricity shall notify the applicant of the available

connection capacity for which such conditions can be satisfied. If, within 30 days from such notification, the entity:

- 1) consents to such capacity, the undertaking issues the conditions for connection;*
- 2) does not consent to such capacity, the undertaking refuses to issue the conditions for connection.*

The running of the period referred to in paragraph 8g is suspended until consent is received from the applicant."

68. The way this is regulated by the "Small Tri-pack" is inappropriate for two reasons. On the one hand, it may easily lead to the practice where applicants will apply for connection capacity much higher than actually needed for their installations. Furthermore, it expands only the extent of discretion vested in operators. In contrast, the extent of grid operators' conduct should be regulated as far as possible by provisions of a mandatory, rather than semi-mandatory or optional nature. The proposed wording seems only to perpetuate the existing scheme which, contrary to the RES Directive, provides freedom to network operators to decide whether there are economic conditions for the connection of new sources to the grid.

69. Another provision added to Art. 7 ELA is paragraph 8d⁴ reads as follows:

"8d⁴. If an applicant for connection of a micro installation to the distribution grid is connected to the grid as a final customer, and the installed capacity of the micro installation which the applicant is seeking to connect is not higher than the capacity specified in the conditions for connection which were issued, connection to the grid is provided on the basis of a notice of micro installation connection, such notice to be submitted to the electricity undertaking to whose network the installation is to be connected, after appropriate safety systems and the tariff metering system have been installed. Otherwise a micro installation shall be connected to the distribution network on the basis of a connection contract. The costs of installing the safety system and the tariff metering system shall be borne by the distribution system operator".

70. This is a positive proposal, as it exempts the smallest renewable sources of energy from an assessment of technical and economic possibilities as a prerequisite for their connection. Moreover, the system operator must bear the costs of installing the safety system and the tariff metering system. Fortunately, this is a model solution that is compliant with the RES Directive since it provides proper incentives for investors and takes account of a large adaptability of micro installations to grid operation.

Conclusions

71. The above discussion leads to the conclusion that the "Small Tri-pack" fails, in all respects, to introduce priority access for renewable sources of energy to transmission and distribution grids as required by the RES Directive, both in terms of their connection, and the sharing of costs which would reflect the benefits of using such renewable sources of energy. The solutions to facilitate the process for micro installations are a positive development. Nevertheless, the RES Directive does not differentiate between sources because of their size or capacity; instead, it requires Member States to ensure priority access for all types and sizes of renewable energy installations.

2. Failure to remove administrative barriers to renewable energy sources being installed

72. New capacity installed in renewable sources of energy constitutes a direct investment. One particular incentive for investment in renewables is the lack of administrative barriers. This is particularly important in the case of investments other than those of a strictly commercial nature where they are used, for instance, to partly produce for one's own needs or to form part of a passive design house³². As for micro installations, which are installed primarily by individuals or housing cooperatives, it is low administrative barriers that may be the prevailing factor in deciding pursue such energy projects.

73. The difficulties in obtaining access to the grid, as discussed hereinbefore, are the main administrative barriers to installing new renewable sources of energy. Besides those difficulties, administrative barriers to new renewable sources arise from various pieces of the Polish legislation, including in particular those concerning spatial planning and development, environmental impact assessment, and the requirement, generally, to obtain a licence for the business of producing electricity.³³

74. In Article 13(1), the RES Directive requires Member States to streamline and expedite administrative procedures at the appropriate administrative level, and to ensure that the administrative burden is proportionate and necessary.

75. The Small Tri-pack does not include any provisions of a deregulatory nature. Therefore, it does not provide for a reduction of administrative barriers which would ensure implementation of Art. 13(1) of the RES Directive.

V. Final conclusions

1. Our analysis above clearly points the noncompliance of the existing Polish legislation with the RES Directive due to the failure to ensure priority access to the grid for electricity from renewable sources of energy.

2. The existing law not only fails to guarantee priority access to the grid for new renewable sources of energy, but also restrains the ordinary (non-priority) access by requiring "technical and economic conditions for connecting to the network and receiving electricity" while the RES Directive provides for no such conditions.

3. The Small Tri-pack fails, in all respects, to introduce the priority access for renewable sources of energy to transmission and distribution grids as required by the RES Directive, whether in terms of their connection or the sharing of costs which would reflect the benefits of using such renewable sources of energy. The solutions proposed to facilitate the process for micro installations are a positive, albeit insufficient, development. However, it needs to be emphasised that the RES Directive does not differentiate between sources because of their size or capacity; instead, it requires Member States to ensure priority access for all types and sizes of renewable energy installations.

³² See the "SAMOsplacający się dom" (self-repaying house) project by a coalition of Polish firms under the auspices of BOŚ Bank S.A. Press information from *Dziennik Gazeta Prawna* daily is available at: http://serwisy.gazetaprawna.pl/nieruchomosci/artykuly/709676,samosplacajacy_sie_dom_slonce_sfinansuje_100_tys_nowych_budynkow.html, and information from *cire.pl* is available at: <http://www.cire.pl/item,77115,1,0,0,0,0,0,koalicyj-eko-polska-proponuje-samosplacajacy-sie-dom.html>.

³³ See more in: B.Iwańska, M.Stoczkiewicz, Legal issues related to promotion and regulation of renewable energy, http://www-user.uni-bremen.de/~avosetta/poland_report2011.pdf [accessed on: 20.06.2013].

4. The difficulties in obtaining access to the grid, as discussed in this Analysis, are the main administrative barriers to installing new renewable sources of energy.

5. The Small Tri-pack does not provide for a reduction of administrative barriers which would ensure implementation of the requirement to streamline and expedite administrative procedures and to ensure that the administrative burden is proportionate and necessary. In this sense, the Small Tri-pack also fails to implement the RES Directive.

6. These deficiencies in the transposition of the RES Directive into Polish national law lead to the conclusion that the enactment of the Small Tri-pack will not make the Commission's action against Poland, as brought to the Court of Justice on 21 March 2013, unsubstantiated. Consequently, when the Small Tri-pack bill is passed into law, this is unlikely to result in the Commission withdrawing its action.

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