Legal issues related to the promotion and regulation of renewable energy

(Questionnaire for the Avosetta meeting in Oslo, April 1-2, 2011)

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Sources:

1. The Constitution of the Republic of Poland of 2 April 1997 (Dz.U. 1997, No 78, item 483, as amended)
2. Obwieszczenie Ministra Gospodarki z dnia 16 grudnia 2009 r. w sprawie raportu zawierającego analizę realizacji celów ilościowych i osiągniętych wyników w zakresie wytwarzania energii elektrycznej w odnawialnych źródłach energii (M. P. z dnia 12 lutego 2010 r. Nr 7, poz. 64) further referred to as t**he Report**

1. National Renewable Energy Action Plan – Ministry of Economy, Warsaw 2010 (further referred to as the **National Action Plan**); http://www.mg.gov.pl/files/upload/12326/KPD_RM.pdf
2. Announcement of the Minister of Economy and Labour of 1 July 2005 on the National Energy Policy until 2025 (Monitor Polski of 22 July 2005); further referred to as the **National Energy Policy** http://www.mg.gov.pl/files/upload/8134/Polityka%20energetyczna%20ost.pdf
3. National Environmental Policy for 2007-2010 and its 2011-2014 Outlook, Warsaw, December 2006 (further referred to as: **National Environmental Policy**) http://www.pigeo.org.pl/upload/file/269.pdf
4. Act of 7 July 1994 on the Construction Law (Dz.U.06.156.1118, consolidated text)
5. Act of 27 April 2001 on the Environmental Protection Law (Dz.U.08.25.150, consolidated text, as amended); further referred to as Environmental Protection Law – **EPL Act**
6. Act of 27 March 2003 on Spatial Planning and Development (Dz.U.03.80.717, as amended)
7. Act of 10 April 1997 on the Energy Law (Dz.U. 1997, No 54, item 348, as amended); further referred to as Energy Law (**EL Act**)
8. Act of 6 December 2006 on the Principles of Development Policy (Dz.U. 2006, No 227, item 1658, as amended); further referred to as Development Policy Act **(DPA Act**)
9. Act of 25 August 2006 on Biocomponents and Liquid Biofuels (Dz.U. 2006, No 169, item 1199, as amended)

Abbreviations:
Energy from renewable sources – further abbreviated as **ERS**
Projects regarding the production of electricity from renewable energy sources – further abbreviated as **ERE project**

I . Introduction

I.1 What is the share of renewable energies in overall final energy consumption in your country? How will / should the proportion and composition of renewable energy develop in your country? Can the requirements of the Directive 2009/28/EC be met or exceeded?

Article 3 (20) of the Energy Law **defines a renewable energy source** as a source which uses wind power, solar power, geothermal energy, sea wave, sea current and tidal energy, energy obtained from the fall of rivers, biomass energy, energy from landfill biogas as well as biogas produced in the process of sewage disposal and treatment or decomposition of plant and animal remains.

Forecast

The National Action Plan defines strategic targets for the ERS share in primary energy consumption at the following levels: 9.58% in 2010 and 15.5% in 2020[1]. National targets for ERS utilisation in respective sectors of economy are: (a) heating and cooling – 12.29% in 2010 and 17.05% in 2020; (b) electricity generation – 7.53% in 2010 and 19.13 in 2020; (c) transport – 5.84% in 2010 and 10.14% in 2020[2].

These targets have been confirmed in the forecast document prepared for the European Commission, which is referred to in Article 4 (3) of the Directive 2009/28/EC. The forecast assumes that estimated excess production of energy from renewable sources, compared to the indicative trajectory, which could be transferred to other Member States in 2020 will amount to nearly 0.5 percentage point. The surplus is predicted to reach its peak in 2014, 2016 and 2018, amounting to over 1.6 percentage point each year. Moreover, it is assumed that "*until 2020 Poland will not need to use renewable energy from other than domestic production in order to fulfil its obligatory share in final energy consumption (domestic production will be sufficient for fulfilling this target)*"[3].

Current state

The Report states that the share of **electricity** generated in renewable energy sources (RES) amounted at the end of 2008 to 4,20%.[4]

The report from the activities of the President of the Energy Regulatory Office (ERO) for 2009 states that the share of **electricity** generated in renewable energy sources (RES) amounted at the end of 2009 to 5.5%.[5]

I.2. From what sources is this renewable energy?

Available strategic documents[6] and the Report[7] show that:

- renewable energy sources with the largest potential include biomass (energy crops, fuel wood, agricultural, industrial and forestry waste, biogas), wind energy[8] and transport biofuels;
- the role of hydro and geothermal energy is less significant (although support for the latter constitutes one of the priorities supported by the Minister of Environment[9]);
- "*solar technologies (despite their high technical potential) can play a significant role in heat production, as in electricity generation their economic effectiveness is low*" [10]; this is corroborated in the report of the President of the Energy Regulatory Office, which highlights the changes in

[1] Cf. National Action Plan, p. 20.
[2] Cf. National Action Plan, p. 20.
[3] Cf. http://www.mg.gov.pl/files/upload/9782/Prognoza.pdf
[4] Cf. The report, table 3.
[5] According to the issued certificates of origin for energy from renewable sources – 'green certificates', cf. The report from the activities of the President of the Energy Regulatory Office (ERO) for 2009, s. 37; http://www.ure.gov.pl/ftp/Biuletyny_URE/2010/2010_03_01-biuletyn_nr3%28sprawozdanie%29.pdf
[6] Cf. National Energy Policy and National Environmental Policy
[7] Cf. The Report, point 4 and 6.
[8] Cf. National Energy Policy, p. 28
[9] Cf. National Environmental Policy.
[10] Cf. National Energy Policy, p. 28, The report, point 4.

heat production, i.e. the fact that heat generation units utilise not only geothermal sources but also solar collectors.[11]

II. The key national legislation to promote renewable energies.

II.1 Subsidies and other financial support

One of the priority areas of action related to the RES sector is to maintain stable mechanisms of financial support for RES utilisation.[12] These mechanisms may take various forms, both in terms of their target groups (they may be addressed to units generating renewable energy, grid operators or individual subjects) and in terms of their scope (e.g. exemptions and reliefs in government and public agency charges, support through subsidies, loan remittance).

Polish legislation provides for a number of various financial support measures for investments in RES. The most common ones include: subsidies, payments to bank loan interest and partial repayment of the principal part of bank loans (Article 411 (1) of the EPL).

The legal basis for granting this financial support is specified in: a) the EPL Act (Article 401c (5)) for national funds and b) in the DPA Act (Article 21) for EU funds as well as a number of executive orders that have the form of state aid programmes. The most important ones include:

1) Regional state aid programme for selected environmental protection investments (2006);

2) State aid programme for investments related to renewable energy sources (2008);

3) State aid programme for thermal waters prospecting and exploration (2009);

4) State aid programme for construction or extension of units generating electricity or heat from renewable energy sources (2009);

5) State aid programme for construction and redevelopment of electricity grids and connections enabling incorporation of units generating energy from RES to the electricity system and transmission of energy from RES (2010).

Financial support measures for RES development are granted as aid for investments and they should be used for selected costs associated with a particular project. Co-financing should be available for investment projects in development of new generation capacities, adjustment of electricity grids to ERS transmission, production of equipment used in RES and prospecting for geothermal waters.

Subsidies are granted by the National Fund for Environmental Protection and Water Management, 16 Voivodship Funds for Environmental Protection and Water Management and the Ministry of Economy within the Operational Programme Infrastructure and Environment and Operational Programme Innovative Economy. The subsidies are covered from national as well as EU funds.

II.2. Exemptions from government and public agency charges

For example, pursuant to Article 9e (16) of the EL, **energy companies** that generate electricity using renewable energy sources of a total capacity not exceeding 5 MW are exempted from: 1) charges for entering certificates of origin for renewable energy to the relevant register;

[11] Cf. The Bulletins of the Energy Regulatory Office 3(71)/2010, s. 77.
[12] Cf. National Energy Policy, p. 19, National Action Plan, p. 116.

2) treasury charges for issuing certificates of origin;
3) treasury charges for issuing a licence for generation of electricity using renewable energy sources;
4) excise tax on electricity generated in RES.

In geothermal energy, companies are exempted e.g. from maintenance charges for extraction of thermal water.

II.3 Purchase guarantees (example: feed-in tariffs)

Polish legal system provides for an **administrative obligation to purchase electricity** from RES. Pursuant to Article 9a (6) of the EL, some energy companies, i.e. *ex officio* electricity suppliers, are obliged to purchase a legally defined amount of electricity generated in RES connected to the electricity grid within the area of their operation. The transaction is conducted at the average selling price for electricity in the previous calendar year, which means that the purchasing price is not always higher than the market price in the relevant year of sale.

II.4 Quota system (example: "green certificates")

Polish legal system provides for a **mechanism of certificates of origin for energy from renewable sources – 'green certificates'**, which should support ERS development. Articles 9a (1 – 5) and 9e (1 – 18) of the EL define the rules according to which this mechanism should operate.

Pursuant to the EL, certain categories of energy companies are obliged to obtain certificates of origin for ERS and submit to the President of the Energy Regulatory Office for redemption. These include: a) energy companies that generate or trade in electricity or that sell electricity to final customers; b) final customers that are members of Polish Power Exchange; c) commodity brokers and brokerage firms trading in energy on the Polish Power Exchange.

Moreover, these companies are obliged to pay a substitute fee, the value of which depends on the difference between the amount of ERS resulting from the aforementioned obligation and the amount of ERS resulting from the certificates that have been actually obtained and submitted for redemption, multiplied by a unit fee. A unit substitute fee equals PLN 240 for 1 MWh. If a particular company submits for redemption the required number of certificates (i.e. the number specified in the obligation), the substitute fee equals PLN 0. The larger the difference between the amount of certificates required in the obligation and the amount of actually obtained certificates, the higher the substitute fee.

Detailed provisions specify the obligatory amount of ERS (in MWh) for respective categories of energy companies.

Substitute fees are incorporated into the resources managed by the National Fund for Environmental Protection and Water Management and should be allocated for subsidising investment projects in RES.

Proprietary rights associated with certificates of origin are tradable and constitute a stock exchange commodity.

II.5 A special legal framework for the installation of facilities for the production of renewable energy sources (short description)

See point III of this report

II.6 Sustainability requirements for biomass / biofuels production? (art. 17-19 of 2009/28/EC)

Currently, Polish legislation does not define any requirements on sustainability of biocomponents and biomass.

The binding Act of 25 August 2006 on biocomponents and liquid biofuels as well as executive orders to this act do not contain detailed sustainability requirements which would transport Articles 17 – 19 of the 2009/28/EC Directive.

III. Mayor legal instruments, arguments, and court decisions concerning environmental protection issues of renewables.

Development of a legal framework for utilisation of renewable energy and improvement of energy efficiency constitutes one of priority measures aimed at increasing the ERS share.[13] Due to their different objectives (environmental protection, energy security, economic and social regional development, social cohesion), legal instruments related to RES are included in legislation of various areas (environmental protection law, energy law, economic activity law, fiscal law). The binding and new legislation[14] is aimed at implementation of development directions for RES defined in various planning documents. These directions include: *maintenance of stable mechanisms supporting utilisation of RES; application of biomass in electricity and heat production (provided that intensive energy crops do not deteriorate environmental conditions due to intensive fertilisation); intensified application of small hydro energy facilities; increased utilisation of wind energy; larger share of biocomponents in the liquid fuels market.*[15]

III.1 Planning instruments

Spatial planning constitutes a basis for spatial management at the national, voivodship and municipal level. Spatial planning and development should among others take into consideration spatial order requirements (*such land development that creates a harmonious entity and in ordered relations accounts for any functional, social, economic, environmental, cultural and aesthetic circumstances and requirements*) and environmental protection requirements resulting from the provisions of the general act (Environmental Protection Law Act) as well as more detailed provisions (e.g. from the Act on Nature Conservation, which reduces municipal authorities' spatial planning competences within protected areas).

Spatial development plans refer also to RES. National plans (*National Spatial Development Concept*) provide for "*designation of areas for wind energy development, utilisation of geothermal energy and establishment of multiannual energy crop plantations, with control of the latter's expansion into areas of particular natural value*".[16] They should be "determined and delimited"[17] in voivodship and municipal spatial development plans,[18] according to the hierarchical structure of the planning system and its cohesion.

Moreover, planning documents developed by municipal authorities define areas for location of facilities generating energy from RES of capacity exceeding 100 kW, as well as their protection zones, where land development and use is restricted (Article 10 (2a) of the Act on

[13] Cf. National Action Plan, p. 29

[14] The current national RES policy covers among others preparation and adoption of legal acts required for transposition of the Directive 2009/28/EC, including a new Act on Energy from Renewable Sources; cf. National Action Plan, p. 29 – 30 and Section VII of this report.

[15] Cf. National Energy Policy, p. 28-30.

[16] Cf. National Action Plan, p. 40.

[17] Cf. National Action Plan, p. 40.

[18] Cf. National Action Plan, p. 40.

Spatial Planning and Development). Municipal spatial development plans are of particular importance for the investment process – it is possible to implement an ERE project only if it remains in accordance with the decisions made in the plans (cf. Point III.2 of this report). If such plans are missing, which happens frequently as they are in most cases non-compulsory, local authorities issue a location decision: a decision on location of a public project (e.g. for construction of energy transmission facilities) or a preliminary planning decision (e.g. for construction of facilities for energy generation from RES) (cf. Point III. 2 of this report).

Each spatial development plan (national, voivodship, municipal) has to undergo strategic environmental impact assessment (SEA).

The second category of planning documents includes documents required by national or EU law, developed by public bodies of different sectors, referring to RES-related issues (*e.g. National Energy Policy; Multiannual Promotion Programme for Biofuels or other Renewable Fuels for 2008 – 2014*) or whose parts refer to this subject (*e.g. National Environmental Policy*). If these documents define frameworks for projects that may have a significant environmental impact (including renewable energy projects) or projects with a possible impact on Natura 2000 sites, their adoption requires a SEA procedure.

III.2 Restricting measures – administrative procedures in an investment process

Environmental law requirements for implementation of investments in generation of renewable energy are reflected in **administrative procedures, which depend on: the character and parameters of a planned investment** (*a project with a significant environmental impact or other types of projects)*, **RES type (***water, wind, thermal waters, sun*) and **investment's location** (*protected area or other*). As a result, a particular project may have to obtain **one or several decisions which in their scope (whole decision or its part) determine environmental requirements for implementation of a particular ERE project**.

Possible decisions include:

a) **Decision on environmental conditions for project implementation approval**, which is required for ERE projects that can have a significant impact on the environment, including a Natura 2000 site (e.g. *water power stations, see point VI of this report*); if required, this is the first decision issued during an investment process and it defines environmental conditions for the planned investment. It is binding for other bodies that will issue further decisions (e.g. those mentioned in b, c or d) connected with the investment process. If not required, environmental conditions are specified in a location decision (b) and/or an investment permit (c or e);
b) **Location decision**, which is required if the relevant municipality does not possess a spatial development plan;
c) **Investment permit**, which may have the form of: a building permit (e.g. construction of a wind farm), licence for mineral extraction from their deposits (e.g. in order to generate geothermal energy), water permit for construction of water facilities (e.g. construction of a water power station);
d) **Use permit**, at this stage of the investment process authorities not only assess whether a particular structure or installation conforms with environmental requirements but also control whether the investor has obtained all the obligatory decisions specifying the scope and conditions of environmental use and verify whether required emission standards are fulfilled;
e) **Permit for investment implementation within a protected area**, if implementation of certain investments is generally forbidden within such areas.

For small, decentralised installations/devices generating ERS, it may be possible to apply special/simplified procedures. These may include[19]: (a) registering new installations/devices that utilise RES; b) acting without the need to register an installation/device or obtain a permit for it (e.g. installation of individual solar collectors).

III.3 Concession for economic activity in the energy sector

Environmental law requirements for investments in ERS generation are also transposed into **concession economic activity** in fuel production, energy generation as well as trade in fuel and energy (Article 32 (1) of the EL). Interestingly, electricity generation in sources with total installed capacity of electricity not exceeding 60 MW is exempted from the obligation to obtain a concession for business activity in fuel production and energy generation. Nevertheless, this exemption does not cover renewable energy sources or co-generation. On the other hand, it covers sources using agricultural biogas (Article 32 (1) (1) of the EL). These concession are issued by the President of the Energy Regulatory Office. Among other things they specify "environmental security measures during and after the end of the activity subject to the licence" (Article 37 (1) (6) of the EL).

III.4 Certificates of origin

See point II. 4

III.5 Grid access and grid operation

Articles 7, 7a and 8 of the EL regulate guaranteed access to energy grids, based on the general rule of third party access, which results from the Directive 2003/54/EC concerning common rules for the internal market in electricity and the Directive 2003/55/EC concerning common rules for the internal market in natural gas. According to the general rule stipulated in Article 7 (1) of the EL, an energy company that transmits and distributes gaseous fuels or electricity has an obligation to conclude a grid connection agreement with entities requesting connection to the grid, on terms of equal treatment, if it is technically and economically feasible to supply energy or fuels and the applicant meets the requirements for being connected to the grid and taking supply. Should the energy company refuse to conclude a grid connection agreement, it is obliged to promptly notify in writing the President of the ERO and the entity requesting the connection, stating the reasons for the refusal. The President of the ERO settles the disputes connected with a refusal to connect a particular party to the grid.

These regulations do not contain any preferences or exemptions for ERS and cannot be considered as fully transposing the provisions of Article 16 of the Directive 2009/28/EC.

Poland has developed a system of state aid for investments in construction and redevelopment of electricity grids and connections enabling incorporation of ERS generation units to the electricity system and ERS transmission (Regulation of the Minister of Economy of 6 December 2010).

III.6 Financial and legal instruments

See point II.1 i II.2

III.7 Education/information

[19] Cf. National Action Plan, p. 41 and further.

In general, RES are promoted through information and education activities, such as implementation of numerous information campaigns (radio, television, Internet)[20], introduction of environmental protection issues, including RES, to school and college curricula of all levels or organisation of regular training. Regardless of this, provision and distribution of information on this subject (procedures, rules, etc.) are regulated by legislation on access to public information, including information on environment and its protection. Product information systems (e.g. eco-labelling) also contribute to environmental education or provision of environmental information. In case of RES this is reflected in the obligation to provide clear information on the availability of liquid biofuels on petrol stations and to label petrol pumps. As for improvement of building energy efficiency, e.g. through RES installation, this is reflected in issuing of energy performance certificates for buildings, which are valid for ten years since issuing (Article 5 (3) of the Construction Law).[21]

III.8 Court decisions:

BIOFUELS and freedom of economic activity, consumer protection and prohibition of discrimination - judgement of the **Constitutional Tribunal** regarding the case K 33/03 OTK of 21 April 2004

The Tribunal analysed the compliance of the Act of 2003 on Biocomponents in Liquid Fuels and Liquid Biofuels, which was binding in Poland at the time of the judgement, with the Constitution of the Republic of Poland. The act transposed the provisions of the Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport. The Tribunal ruled that (a) the provisions of the aforementioned act that obliged entrepreneurs to "*apply biocomponents proportionally to the total amount of fuel introduced to turnover*", whose violation was sanctioned with financial penalties, infringed the constitutional principle guaranteeing freedom of economic activity and the principle of proportionality, while (b) those provisions of the act that permitted sale of "*liquid fuels without any indication of the percentage of biocomponents therein – unlike for biofuels*" violated constitutional protection of consumers (Article 76) and their right to acquire information (Article 54 (1)).
In its judgement, the Tribunal also stated that application of the challenged national provisions, which alter the Directive's aim "*from promotion to imposition of an obligation*", to all manufacturers (sellers) – not only national, but also foreign, including those established in other EU Member States – would constitute a restriction on the free movement of goods between Member States in contravention of European Community law. Conversely, limiting the applicability of the reviewed provisions to Polish manufacturers (sellers) would lead to reverse discrimination (*à rebours*). Protection against reverse discrimination is a constitutional obligation of national authorities.
At the same time, the Tribunal emphasised that its judgment "*does not, as such, resolve the idea of promoting the use of fuels with biocomponent additives. The possibility or rationality of producing and trading in such fuels may not be ruled out. For constitutional reasons this may not, however, be effected in the form of compulsory production or compulsory purchasing*".

Obligation to purchase energy from renewable sources and freedom of economic activity – judgement of the **Constitutional Tribunal** regarding the case P. 24/05 OTK-A 2006

[20] Cf. National Action Plan, Section 4.2.4 (p. 53 and further).
[21] Cf. National Action Plan, p. 44.

of 25 July 2006

The Tribunal analysed the compliance of Article 9 (3) of the Energy Law, which on the day of the judgement obliged energy companies to purchase electricity and heat from unconventional and alternative sources (currently this obligation is stipulated in Article 9a (6) of the EL) with Article 22 of the Constitution of the Republic of Poland (freedom of economic activity). The Tribunal ruled that due to the regulated character of the energy market as well as constitutionally-legitimised needs, it is justified to limit the freedom of economic activity in this sector. In the Tribunal's opinion, this example confirms the thesis that economic freedom is strongly connected with interests of other parties, including public interests, which may serve as a basis for introduction of more extensive restrictions than with regard to personal freedom. These restrictions have to conform with the principle of proportionality, stipulated in Article 31 (3) of the Constitution of the Republic of Poland. Analysing the obligation to purchase electricity and heat from unconventional and renewable sources, the Tribunal ruled that it did not infringe the freedom of economic activity principle, defined in Article 22 of the Constitution of the Republic of Poland, as this limitation had been imposed by means of an act in order to secure public interests and its scope conformed with the requirements of the proportionality principle.

JUDICIAL REVIEW OF ERE PROJECTS

As far as ERE projects are concerned, **Voivodship Administrative Courts (VAC**) or *the* **Supreme Administrative Court (SAC)** have reviewed a number of "investment decisions" (*decisions on environmental conditions and/or location decisions, building permits*) issued for such projects as construction of a wind farm or a water power station. The disputes referred to infringement of substantive law (*negative impact on environment, including human health, negative impact on Natura 2000 sites, violation of local spatial development plans*) or adjective law (*e.g. the fact that a particular decision does not refer to the results of the public participation procedure).*

VAC judgement on II SA/Gd 258/10 (29.09.2010) – accuracy of environmental impact assessment

The court dismissed the complaint filed by NGOs on the (positive) decision on environmental conditions for approval of a project that consisted in construction of a complex including three wind turbines with the capacity of 2 MW each and accompanying infrastructure, such as access roads and utilities (cable connections and connection to the main power supply point).

NGOs raised the following charges: (a) insufficient accuracy and expertise of the EIA report (the appellants believed that the EIA had not been prepared by a person independent of the investor), (b) inadequate assessment of environmental threats (the appellants believed that the investment would disturb natural bird migration routes and habitat continuity and would constitute a threat for human health through noise emissions and the shadow effect) and (c) lack of the obligation to conduct monitoring and to present an *ex-post* analysis in the decision. **The court ruled that the charges were not legitimate**.

VAC judgement on II SA /OI 755/10 (09.12.2010) – Natura 2000

The Court allowed the complaint filed by NGOs on the (positive) decision on environmental conditions for an approval to implement a project consisting in construction of 40 wind turbines with the total capacity of 120 MW and accompanying infrastructure (*a main power supply point, an MV cable connecting the power station with the main power supply point and internal road with access to municipal roads*) **within a Natura 2000 site**.

The court ruled that the administrative body which issued the decision **had not analysed the facts and the collected materials sufficiently thoroughly**. It had not conducted a thorough assessment and verification of the following charges: (a) a wrongly defined scope of the EIA report for the planned project; (b) imprecise and laconic statements included in the EIA report; (c) lack of information on basic characteristic traits of the local avifauna; (d) lack of an analysis regarding spring migration, ranges and hunting grounds of the Accipitriformes; (e) lack of information on occurrence of lesser spotted eagle within the analysed area; (f) faulty method applied for habitat assessments within the EIA report, including an inadequate assessment of the Natura 2000 site's significance and objectives.

The court stated that the decision violated also procedural provisions, as its justification did not refer to the results of the public participation procedure.

In consequence, the aforementioned infringements had an impact on the final conclusions and the decision, which defined among others the conditions for the use of the protected area during the project's investment and operational stages.

It is worth noting that the administrative body issued the decision despite the fact that the body relevant for Natura 2000 issues refused to approve it.

VAC judgement on II SA/Wa 1247/08 (19.11.2008) –Natura 2000

The court dismissed the complaint filed by an **investor for the decision of the Minister of Environment refusing to approve the project** that consisted in construction of a small water power station.

The minister refused to approve it **due to the project's significant negative impact on the planned Natura 2000 site** (*the area constitutes a habitat for numerous protected fish species, such as: salmon, sea lamprey, brook lamprey and many others; there was a risk that the project would make the river impassable; the project jeopardised salmon habitat restoration*).

The court ruled that the minister's decision complied with the legislation. The minister proved that "*the planned investment would have a significant negative impact on the Atlantic salmon stock (Salmo salar), for which the Natura 2000 site in question was established*". At the same time the court stated that in this case the need for increasing the amount of energy produced in RES could not justify any departure from the Natura 2000 nature protection regime (Article 6 (4) of the Directive 92/43/EEC).

VAC judgement on II SA/Ke 343/08 (30.10.2008) – qualification of a project to EIA

The court dismissed the complaint of eligible parties to the (positive) location decision for the investment consisting in construction of technical infrastructure (one small wind turbine installed on a steel, 21-metre-long pole, with the total height of 29.9 m) and underground power line. **One of the disputed issues was whether** the planned project qualified as a project with a possible significant environmental impact, as a result, requiring a decision on environmental conditions and EIA. The appellants believed that it did qualify, while the administrative body that it did not.

The court supported the administrative body and ruled that it had correctly decided that the **project was neither a project for which an EIA was always required**, the power station's planned capacity (75 kW) did not exceed the statutory minimal threshold of 100 MW, **nor a project that could require an EIA**, as the planned height (29.9 m) did not exceed the statutory minimal threshold of 30 m.

The court dismissed also the charge that the administrative body ignored the cumulative impact of the planned wind turbines within the analysed area, as the body had rightly found

that there were no other structures of such a type within the area in question. Moreover, the court ruled that the charge of excessive noise emission was premature.

VAC judgements on: SA/Łd 657/09 (04.11.2009) and II SA/GI 554/10 (28.10.2010) – investment's compliance with local spatial development plans

In the first case the court ruled that the planned investment in construction of a wind farm did not violate the decisions of the relevant spatial development plan. According to the plan, the area in question could be used for agricultural crops and industrial purposes. Regardless of this, the plan allowed for **construction of power installations within any area covered by the plan**.

In the second case the court ruled the opposite, judging that the planned investment in construction of two wind turbines violated the decision of the relevant spatial development plan. **The court concluded that the investment was planned within an area** that according to the plan should be used for horticulture or greenhouse crops. At the same time the plan ruled out a possibility of other usage. The plan allowed for energy investments **only if they consisted in extension, redevelopment and upgrade of already existing grids**.

RES IN THE PUBLIC PROCUREMENT PROCEDURE

SAC Judgement on II SA 23/99 (14.03.2000)

The Town Council of Z. adopted a resolution introducing the town's environmental protection programme. The document provides for elimination of coal and coke based heating installations in favour of environmentally-friendly solutions, including geothermal energy. The decision was justified by the town's location in a basin with very poor air circulation and in the vicinity of a national park and a Natura 2000 site. In consequence, local authorities had to apply to the President of the Public Procurement Office for an approval for a single-source procurement procedure for supply of heat energy to municipal organisational units. This application was justified by the fact that the market of heating with geothermal energy was in fact monopolised in the municipality by the company G.

The President of the Public Procurement Office refused to grant an approval, stating that the situation did not fulfil the conditions of an actual and objective monopoly and that due to the new environmental protection programme, the company G. gained an artificial monopoly in the municipality.

The court dismissed the President's reasoning, ruling that the municipality had made a legally acceptable choice in favour of environmentally-friendly heating with use of geothermal energy, which was justified by environmental, economic and organisational reasons and **that the President of the Public Procurement Office did not have a right to question such a choice**. The court argued that since the company G. was an actual monopolist in heating with geothermal energy within the municipality in question, it was justified to apply a single-source procurement procedure.

IV . Is there a national debate about the sense and nonsense of renewable energies, and if so, has this led to changes or corrections of the regulatory framework?

Since autumn 2010, opinion-forming and high-circulation journals, such as *Rzeczpospolita*, *Gazeta Wyborcza* or *Dziennik Gazeta Prawna*, have been publishing views presented by representatives of the power sector, who generally question the sense of the EU climate

policy. This criticism refers also to subsidies for RES and regulative burdens imposed on energy from hard coal and lignite through the system of CO_2 emission allowances. This sceptical attitude results from the fact that over 93% of energy consumed by Polish economy comes from coal. Representatives of the power sector call for a reduction in subsidies for ERS in favour of subsidies for clean coal technologies, including carbon capture and storage.

To date, these opinions have not resulted in changes to the legislative framework covering renewable energy.

V. How well do the public accept renewable energy proposals (e.g. new on- shore and off-shore wind farms, biomass plants etc.)?

No information available.

VI. SEA and EIA aspects

VI.1 How does Strategic Environmental Assessment and Environmental Assessment apply to renewables in your country? Have any particular legal/procedural issues emerged??

General SEA and EIA rules and procedures apply to plans and projects in the RES sector.
SEA has to be conducted prior to adoption: (a) spatial development plans, which contain among others decisions regarding RES (as described in Section III of this report); (b) sector plans required by various acts, prepared by public administration bodies among others in industry, energy, water management, which provide a framework for implementation of projects that may have a significant environmental impact (cf. Section III of this report); c) all other documents that may influence Natura 2000 sites.

EIA is conducted during the procedure of issuing a decision on environmental conditions (cf. Point III.2.a of this report). It is carried out for projects **that"**

- **always have significant negative environmental impact** (group I, e.g. *installations generating electricity from wind, with total rated power of at least 100 MV and located within marine areas of the Republic of Poland*)
- **and projects with a potential significant negative environmental impact** (group II – e.g. *water power stations; installations generating electricity from wind other than those falling within the scope of group I, located within areas with a nature protection regime or with total height of at least 30 m; installations of specific parameters for production of biofuels from plant products; installations for fuel combustion (e.g. biomass) in order to produce electricity or heat of specific parameters).*

VI.2 How does Natura 2000 influence the promotion of renewables

Natura 2000 can be treated:

- as a criterion which determines that plans or projects have to be subject to EIA (e.g. *installations generating electricity from wind, located within a Natura 2000 site*);
- as a criterion which determines that plans or projects have to be subject to Habitat Assessment (*each plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects*);

- as a criterion excluding the possibility of implementing an ERS project (*in case of negative impact on a Natura 2000 site and of the absence of perquisites included in Article 6 (4) of the Habitat Directive*);
- as a criterion promoting ERE projects (cf. the judgement II SA/99, described in Section III);
- as a criterion which restricts the possibility of obtaining biomass from forestry[22].

VII. Do the existing or planned national legal instruments promoting renewables already comply with EU law or are important adaptations required?

Directive 2009/28/EC should have been fully transposed to Polish legislation by 5 December 2010. Pursuant to Article 27 (1) of the Directive 2009/28/EC, measures adopted by Member States have to refer to this legal act.

Polish legislation does not contain a legal act that would refer to the Directive 2009/28/EC. The Energy Law Act, i.e. the basic act in this sector, refers only to the Directive 2001/77/EC, which has been repealed by the Directive 2009/28/EC. Legal measures for promotion of energy from renewable sources conform with the previously binding directive 2001/77/EC but comply only partially with the Directive 2009/28/EC.

Polish legal framework is currently lacking in particular:

1) authorisation, certification and licensing procedures that would fully comply with Article 13 of the Directive 2009/28/EC;

2) provisions ensuring availability of information on equipment or systems that use RES, certification schemes, guidelines for planners and architects, in conformity with Article 14 (2, 4 and 5) of the Directive 2009/28/EC and provisions ensuring that the public is informed about RES used in transport, in conformity with Article 21 of the Directive 2009/28/EC;

3) provisions ensuring access of energy from renewable sources to grid infrastructure, in conformity with Article 16 of the Directive 2009/28/EC (current regulations do not follow this provision – see Point III.4);

4) provisions defining sustainability criteria for biofuels and bioliquids, in conformity with Article 17 of the Directive 2009/28/EC;

5) provisions ensuring verification whether biofuels and bioliquids comply with the sustainability criteria, in conformity with Article 18 of the Directive 2009/28/EC;

6) provisions specifying how to calculate the impact of biofuels and bioliquids on greenhouse gas emissions, in conformity with Article 19 of the Directive 2009/28/EC.

VII. What is the status of adoption of the new pieces of legislation necessary to transpose into domestic law the new provisions of Directive 2009/28/EC?

As far as transposition of the Directive 2009/28/EC to Polish legislation is concerned, the Ministry of Economy is preparing assumptions to the Act on Renewable Sources of Energy, which should implement the Directive.

IX. Were there already court decisions or infringement procedures taken by the Commission concerning this question?

The Court of Justice of the EU has not issued any rulings on lack of implementation of the Directive 2009/28/EC in Poland.

[22] Cf. National Action Plan, p. 121.

No data is available on infringement procedures initiated by the European Commission against Poland in this area.

X. Is there anything like a general framework act on climate change issues, and if so, what is its main content? If no, is such an act being considered?

Currently, Polish legal system does not contain any general act that would fulfil the role of a climate protection act.
Neither Polish government nor the Parliament is considering adoption of such an act.