Energy Overview

Due to its geographical location, political and economic situation, and coal resources, Poland's energy system has been based on coal, natural gas and other fossil fuels. In line with the efforts of all European Union Member States to achieve EU climate neutrality by 2050, Poland has taken steps to develop a low-emission national power system. The commitment to achieving climate neutrality is one of the greatest economic challenges in Poland's history, impacting nearly all areas of citizens' lives and offering an opportunity to boost economic growth. Undoubtedly, a factor that will accelerate the energy transition process in Poland will be the acquisition and expenditure of funds from the National Recovery Plan, a plan for reform aimed at implementing specific tasks at both the national and local levels to reduce Poland's reliance on fossil fuels.

Poland has adopted the National Energy and Climate Plan for 2030, aiming to achieve a relatively low level of CO2 emissions by that time (the reduction target for 2040 is currently being agreed upon by the new government - it seems that due to high social costs, Poland will not be able to achieve a reduction of 90% by 2024 as assumed by the EU). An additional goal is to ensure stable energy supplies at acceptable prices for consumers, energy-intensive industries and the heating and agriculture sectors.

A noticeable trend in the Polish market in recent years has been significant investments in renewable energy sources, primarily wind and solar farms.

Poland is implementing projects to build offshore wind farms, in cooperation with a private Danish investor. Additionally, individuals, entrepreneurs and households are investing in their own low-capacity solar panels.

In the near future, grant competitions and the allocation of government and EU grants for the development of biogas and biomethane plants will commence, making Poland's energy mix even more eco-friendly.

Polish legislation supports the development of offshore wind farms, among other initiatives, by implementing various compensation models for energy producers, aimed at ensuring the profitability of these investments.

Tax Overview

The Polish tax system is a nationwide system (i.e. the same taxation rules apply throughout the country). The exception is local taxes (including real estate tax): while the general rules for collection and payment are uniform throughout the country, individual communes can determine the real estate tax rate (within the ranges specified by the national legislator).

Regarding other taxes - including income tax, value added tax and excise duty - the content of Polish regulations should be consistent with the content of Tax Directives established throughout the European Union.

Polish corporate income tax regulations are based on one legal act and are common for all companies in Poland. They do not provide for separate rules for taxing income from transactions involving energy or gas.

In the field of goods and services tax, specific taxation rules are provided for (e.g. regarding the place of taxation or the moment of tax liability), but they are consistent with EU Directives.

A special tax that burdens energy and gas is excise duty.

The national legislator does not provide for VAT exemptions or relief for electricity, gas or heat.

The Polish transfer pricing regulations generally follow the OECD Transfer Pricing Guidelines approach, adopting the arm's length principle, three tier documentation, transfer pricing adjustments, and Advance Pricing Agreements (APA) and Mutual Agreement Procedures (MAP) procedures. However, in some areas more detailed information in the transfer pricing documentation or more reporting obligations might be required (e.g. TPR report).

Taxation of Energy Projects

In Poland, business activities in the field of electricity, gas and heat are carried out by both private enterprises (corporate companies and partnerships without the participation of the State Treasury) and commercial law companies with partial or full participation of the State Treasury.

The most commonly used structures for energy projects are corporate companies and partnerships which are treated in Poland as corporate income tax taxpayers. Under certain conditions companies can form a Tax Capital Group and file jointly for tax purposes. **The standard Corporate Income Tax (CIT)** rate in Poland is 19%. Taxpayers may be able to choose lower rates or specific methods of taxation however their adoption may not be feasible for energy projects. CIT is generally payable on income, i.e. a difference between tax revenues and tax deductible-costs, separated into two baskets: capital gains and other sources (operational activities).

Financing has to be considered as energy projects are typically capital-intensive, in particular the matter of debt and equity ratio. In general terms, deductions available for equity are rather insignificant and dividends paid are not tax deductible.

Regarding debt-financing, interest is recognized as tax deductible once paid or capitalized (accrued interest is not tax deductible), however it is subject to limitation. A deduction can amount to either PLN 3 million or 30% of a debtor's earnings before interest, taxes, depreciation and amortization in a tax year in accordance with Poland's thin capitalization rules. Interest paid, capitalized but also accrued on financing during the course of construction is allocated to the initial value of fixed assets.

Investments which fall under the long-term public infrastructure project definition may be exempted from this limitation, yet this issue is controversial.

As energy projects generally require a high volume of fixed and intangible assets to operate, income can be also lowered by depreciation write-offs from acquired or constructed assets. Different depreciation rates apply to different classes of assets such as buildings, structures, machinery and equipment, and one of a few different depreciation methods may be chosen. Land is not subject to depreciation.

As a general rule, dividend payments are subject to a 19% Withholding Tax **(WHT)** rate, whilst interest, royalties and certain intangible services are subject to a 20% WHT rate (when paid to non-residents). Exemptions or rate reductions based on double tax treaties or EU Directives may apply, provided that the beneficial owner status of the payment recipient is verified – this is subject to the scrutiny of tax authorities. The pay & refund mechanism applies to those payments (except for intangible services) which exceed PLN 2 million within a year to a related party, meaning that WHT must be collected and may be later refunded by the tax authority. To not apply the pay & refund mechanism, the remitter can either (i) apply for an opinion on the application of WHT preferences, issued within 6 months by a tax authority and valid for 36 months or (ii) submit a management board statement in which the board member confirms possession of documents and performance of verification required to apply the preference. The statement is submitted under personal liability of the board member and severe penalties for misstatement apply.

Taxation of Energy Projects

With respect to **Transfer Pricing (TP)**, not only foreign, but also domestic transactions, are subject to TP obligations. As a rule, for intercompany transactions exceeding certain materiality thresholds (PLN 10 million for goods and financial transactions, PLN 2 million for services and other transactions), a Local File documentation and TPR report is required.

The Local File documentation must always include a transfer pricing analysis with a benchmarking study or a compliance analysis. All five transfer pricing methods from the OECD Guidelines are accepted. Where it is not possible to apply one of the five standard methods, another so-called "sixth" method which is most appropriate under specific circumstances shall be applied, including the valuation techniques.

Benchmarking studies of energy projects include investment methods (e.g. analysis of the internal rate of return from a particular project). For intragroup financing transactions in this segment, not only the interest rate but also the financing source and debt to equity ratio are in the scope of the tax authority's interest.

If transfer prices are questioned by tax authorities, an additional tax liability may be charged, which amounts to 10-30% (depending on the circumstances) of the total amount of (i) unduly reported or overstated tax loss and (ii) not fully or partially reported tax income, to the extent resulting from the decision. The additional tax liability will be increased by interest on arrears.

For non-filing, late-filing or wrong-filing of the TPR reports to the tax office and the Local File documentation to the Tax authorities (upon their request), there are also fiscal penalties for board members of the company.

In terms of the **tax on goods and services (VAT)**, it applies to the supply of goods and services within the territory of the country, as well as the transactions outside and within the EU.

The regulations provide that for VAT taxation for the supply of energy and gas, the place of taxation is deemed to be the place of residence of the recipient. The regulations also provide for special rules for the creation of the VAT tax moment – it is detached from the date of the supply of energy or gas and depends on the moment of issuing an invoice for such a supply. Advance payments for the supply of energy are not subject to VAT (the supply made after receiving the advance payment is taxed).

The VAT rate on electricity, gas and complementary services (including the sale of guarantees of origin, balancing and scheduling services, distribution and transmission services) is 23%. Due to rising energy and gas prices in 2022, the legislator temporarily reduced the VAT rate on these goods and services to 0% (for electricity) and 5% or 8% (for gas – depending on the period of validity of the reduced rates.

From 2023, the legislator decided to freeze energy and gas prices (establishing a maximum price) and implement a compensation system for sellers - these compensations payments constitute a subsidy subject to VAT.

In terms of **customs and border duties** (except for the **Carbon Border Adjustment Mechanism (CBAM)**), the following applies: a 0% customs rate for all, no customs security and VAT exemption for imports of energy and gas transported via the network system.

A special tax that also covers electricity and gas is excise duty. Excise duty on these goods is harmonized within the EU. Entities that are obliged to settle excise duty are primarily energy and gas trading companies when they sell these goods to end-use buyers (no taxation on sales between two energy companies) and on consumption (when energy was not subject to excise duty at the previous stage of trading). The excise tax rate on energy is PLN 5/1MWh (the lowest possible rate indicated in the EU Directive). Excise duty is settled on a monthly basis. In 2022, due to rising electricity prices, the legislator temporarily exempted energy from excise duty (unconditional exemption for households) and reduced the rate to PLN 4.80/1MWh for entrepreneurs.

Other Tax Issues To Be Considered

Under EU regulations, each European Union member state is obliged to adopt instruments to implement the EU 'Fit for 55' package of legislation. This includes the import of electricity under the CBAM system from July 2024. This is one of the proposals which has the nature of a carbon border tax (a mechanism for adjusting prices at borders taking into account CO2 emissions). The functioning of the CBAM system assumes both the reporting of CO2 emissions related to the production of imported goods and the payment of duties depending on whether the emission threshold is exceeded.

The Polish Real Estate Tax **(RET)** is a property tax levied on the ownership (or a perpetual use right) of real estate.

RET is a local tax paid in each commune (municipality) where a taxpayer owns real estate infrastructure. The tax applies to land, buildings, and non-building structures, each with different tax rates and bases. Therefore, it's crucial to identify and tax each category of RET-subject property separately.

Due to a lack of specific regulations, the correct subject and method of taxation are often determined by administrative court rulings and the Constitutional Tribunal.

Commune councils independently set RET rates through resolutions. While there are upper limits defined in the Local Taxes and Fees Act **(LTFA)**, these limits are adjusted annually for land and buildings.

The Ministry of Finance announces the upper limits for the following year by an official notice published before October 31st of each year. The upper limit for non-building structures is fixed at 2% of the initial value of the structure.

Importantly, the rates established by commune council resolutions cannot exceed the upper limits outlined in the LTFA.

The LTFA classifies various energy and gas infrastructure (e.g. gas pipelines, heating networks, pipelines, power lines) as structures. This classification results in an annual 2% tax based on their initial value.

Companies can deduct RET payments when calculating their CIT.

Effectively from 2024, a local **minimum CIT** (not to be mistaken with the following global minimum tax) is in force, applicable to businesses reporting a tax loss or low profitability, however it is subject to many exemptions.

Poland is also obliged by the Pillar II Directive to introduce global minimum level of taxation for multinational enterprise groups and large-scale domestic groups which would ensure minimal 15% effective rate. The tax act project is currently at the public discussion stage and should enter into force by the beginning of 2025.

Entities acting in the gas or electricity industry are obliged to pay a **specific contribution in the form of the write-off to a dedicated fund**. The write-off is determined based on a special formula which consists of average sale price, transaction volumes and other factors. This was introduced instead of windfall tax.

Relevant Experience

Crido has worked on many significant energy projects that have covered complex tax matters requiring an innovative approach.

- For many top energy clients Crido is the principal tax consultant providing ongoing tax advisory services, including analysing contracts from a tax perspective, advising on new business models, tax planning for the future, litigation consulting, audit support, annual tax reviews, support in establishing and selling new companies and TP support.
- Crido has been providing long-standing services to energy sector clients, including the biggest state-owned companies. We offer services to every type of entity in the value chain: energy trading, energy generation, energy transmission and distribution, developers, service companies, investment funds, and innovation hubs.
- We have extensive hands-on experience in supporting pioneering in Poland's offshore wind farms joint venture (JVs) projects, including JVs of Polish state-owned or private partners with a foreign renewable energy leader.
- Providing comprehensive support for strategic international projects for the construction, development, and operation of wind farms in the Baltic Sea. The projects have strategic importance for Poland's energy transition. Crido's support includes:
  1) Designing optimal company structures (ProjectCos, ServiceCos, HoldCos, other),
  2) Developing tailor-made financial & transfer pricing models accommodating business goals, expectations of stakeholders (incl. financial institutions) and the Contract for Difference (CfD) framework,
  3) Financing: Project finance, structuring intercompany financing, guarantees, WHT and project modeling for banks avoiding cash-traps,
  4) Addressing transfer pricing risks with the Advanced Pricing Agreement (APA),
  5) Managing tax risks that can arise from offshore agreements including (Fixed Price **FP**-) Power Purchase Agreements (**PPA**), Corporate Power Purchase Agreements (**c-PPAs**), Virtual Power Purchase Agreements (**v-PPA**), Operation & Maintenance Agreements (**O&MAs**) and Construction & Management Agreements (**C&MAs**).

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