



Discovering the new renewable legal order in Poland: with or without wind?



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ABSTRACT

Poland has been praised for the development of onshore wind energy in recent years. This may be stopped by the *act on the investments in wind power plants* of May 2016. Seemingly it looks like a typical regulation concerning spatial planning. However, its provisions raise many controversies, as in practice it does not address running wind investments but rather blocking them. The new law eliminates several investment opportunities in terms of land for their construction (*inter alia*, because of a buffer zone enacted in the new legislation). These circumstances are highlighted in my paper in which I delve into the legislative process related to the *investment act*, providing analysis of the initial proposal and the current law in force, as well as listing the controversies and burdens imposed on the wind energy sector.

1. Introduction

In May 2016, the Polish Parliament passed *the act on the investments in wind power plants*. The act that sets out the conditions and procedures for localising and constructing wind power plants in the vicinity of existing or planned residential areas. Although seemingly it looks like a typical regulation concerning spatial planning, its provisions raise many controversies; not to mention its original version (proposed in February 2016) that has raised even more objections.

The aim of my paper is to present the main assumptions of this legislation and analyse them, assessing their advisability and compatibility with European law and national law, as well as their influence on the wind energy industry in Poland. Moreover, in this article I address the background of *the act on investments*, describing the reasons that contributed to its creation. In addition, I juxtapose the amendments to the first version to the legislation presenting how the law has evolved during the legislative process. Finally, I try to highlight some of the possibilities for the development of the Polish renewable energy sector, referring them to law in force and the European obligations which impose a 15% goal of energy generated from renewable sources in its final energy consumption by 2020.

Although the paper is oriented towards the wind energy policy situation in regards to Poland, for the research community it provides evidence that the unregulated development of the energy sector may lead to overregulation, and – as a result – rapid growth will be significantly reduced. The analysed case study of the Polish wind industry, with the new rules for investment in this sector, confirms this tendency.

In terms of methodology, I use the classical approach to analyse the

legal text. It comprises two legal methods of interpretations: the literal and the systematic. I apply them to assess the meaning as well as the context of presented legal provisions. With respect to the latter interpretation, I evaluate the provisions of *the act on the investments in wind power plants* in reference to the other legal acts in the system of Polish law. Moreover, I apply the functional approach that helps to describe the influence of the legislation on the wind energy sector in Poland. Apart from this, the paper includes comparative legal analysis based on the comparison of Polish and European legislation.

2. Behind the new legislation

In February 2016, a group of Parliamentary Members representing the ruling party Law and Justice (PiS – *Prawo i Sprawiedliwość*) sent to the Polish parliament a proposal for a bill titled – misleadingly – *the act on the investments in wind power plants*. Misleadingly, as the proposal, which was later passed into law by the Parliament, does not address running wind investments, but rather blocks them. The latter approach stems directly from its [Explanatory Memorandum](#). As stated there:

[s]ince 2009, an extremely dynamic development of wind energy can be observed in Poland. Unfortunately, so far the legal framework for locating, constructing and operating wind turbines has not been sufficiently formulated. As a result, these installations are being placed too close to residential buildings. This became the cause of numerous conflicts between disgruntled residents and municipalities, as these devices emit noise, inaudible to the ear infrasound, cause vibration, a flickering effect, and may also constitute a direct threat to life or health in the event of failure or

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the icing of blades in the winter. This situation caused a number of citizens and associations (created specifically to prevent the construction of wind power plants in specific locations / municipalities) to directly address both Members of Parliament, as well as members of the Council of Ministers, asking for the cessation of construction of wind power plants.

According to information provided by the authors of the proposal, up until February 2016 more than 70 interventions had been presented either to parliament or government. 20 of them were made by associations ([Explanatory Memorandum](#)). Moreover, the issue of investments in the wind power plant was the subject of an audit conducted by the Supreme Audit Office (NIK – *Najwyższa Izba Kontroli*) between 2013 and 2014 (NIK, 2014a). The audit was related to an assessment of compliance with restrictions on the location and construction of onshore wind farms by the relevant public authorities. Particularly, it was concerned with evaluating if and how the principles of spatial planning and environmental protection were respected, as well as how an impact of the onshore wind farms on local residents was reduced (NIK, 2014a, p. 6). As a result, the Supreme Audit Office negatively evaluated the process of constructing onshore wind farms in Poland. The Office ascertained numerous irregularities in terms of investments in land wind turbines. They included, *inter alia*, local authorities ignoring public protests in their decision-making process; the construction of wind power plants on land owned by local government leaders or employees; or relevant permits being issued by local authorities on the condition of donations being provided by wind farm companies to the municipality (NIK, 2014b). As the Office reported “the construction of wind farms was often accompanied by a conflict of interests, opacity and corruption threats. Unclear provisions of law as well as an inconsistent doctrine and jurisdiction did not provide a sufficient guarantee that wind farms would be erected an environmentally friendly manner or limit the inconvenience to the people living nearby” (NIK, 2014b). Seen in this light, “the audited municipalities, despite numerous protests concerning the location of wind farms, did not organise a referendum in that matter, although that solution was provided for in law” and “[d]ecisions on behalf of local communities in that respect were taken exclusively by city council members without taking into account the arguments of local communities” (NIK, 2014b).

There were other Supreme Audit Office's remarks concerning Polish law applicable in 2014. This included the fact that “Polish law did not specify the safe distance between wind farms and developed land, especially when inhabited by people”; the lack of “acceptable norms concerning other potential threats, such as infrasounds or stroboscopic effects”; not allocating wind power plants “to any category of construction facilities” in construction law; or “unclear law, inconsistent jurisdiction and doctrine resulted in discrepancies in the interpretation and application of legal provisions concerning the location of wind farms on environmentally protected areas despite controversies and protests of local communities” (NIK, 2014b). Finally, the Supreme Audit Office recommended the following measures should be taken. The Office suggests to:

1. define ways of financing the municipalities' planning documentation relating to the construction of wind power stations which would require specific law changes,
2. develop a consistent methodology to measure the emissions of noise generated by wind farms,
3. effectively limit the possibilities of locating wind farms in environmentally protected areas,
4. establish the legal basis for permitting the use of wind farms,
5. cover the use of wind turbines with technical inspection.

In terms of the matters arising from the audit, the Supreme Audit Office addressed the Prime Minister and the Minister of the

Environment with proposals to change the law (NIK, 2014b). But it was not until 2016 when everything speeded up and “solving the problem of wind power plants” (or “blocking their development”) got the green light. To a large extent, this acceleration in terms of relevant legislative work is a result of the 2015 parliamentary elections and the victory of the Law and Justice Party. The party has been showing their disaffection to wind power plants for a long time. In 2012, the PiS Parliamentary Members submitted a proposal to amend both the act on construction law and the act on spatial planning and land development to the Polish parliament (no. 758). The drafted legislation was aimed at protecting citizens against the harmful effects of uncontrolled dissemination of wind energy installations. Its main goal was to include the wind power plants with a capacity of more than 0.5 MW in the catalogue of buildings. As a result, the Minister of the Environment was to be obliged to issue regulations determining the technical conditions of construction and placement of wind power plants, taking into account the 3-kilometre protection zone. The nature of the legislation should be rather described as “strict”. In practice the proposal contained a ban for building wind power plants with a capacity exceeding 500 kW within 3 km from residential buildings and forest areas. However, after internal, parliamentary discussion and different stages of the legislative process the proposal was finally rejected in 2014.

Nevertheless, one element outlined in the 2012 proposal has been kept as a subject of further parliamentary work. It was an exclusive role of the local spatial plan as being the only legal basis for locating wind power plants. This regulatory rule, as a standard for constructing all renewable energy sources except microinstallations, was included also in two other proposals of legislation sent to the Polish parliament in 2014 (3896) and 2015 (no. 3896). However, the end of the term of the previous parliament (September 2015) caused work on these proposals to remain unfinished. As already mentioned, the elections of 2015 put new wind in the sails of those who have been trying to block (or regulate) the development of wind power in the country.

3. Initial proposal: *Malleus Ventimolarum*

The initial proposal of the investment act could be compared to solutions addressed in the dark times of “the witch-hunt.” As it contained many controversies about the burdens imposed on wind turbines, I call it the *Malleus Ventimolarum* – “Hammer of the Windmills”, a phrase derived from the Latin book *Malleus Maleficarum* – “Hammer of [the] Witches”, a medieval treatise on the prosecution of witches. This connotation emerges from the severity of the first version of the proposed legislation, where in many cases the wind installations (or their operators and investors, if personalisation is needed) are treated almost like witches.

The drafted provisions of the new legislation prove the correctness of the proposed description. In fact, they would have hammered the development of the wind energy sector, significantly hindering it. Parenthetically, this does not mean that the current law does not have such a character. It is just a matter of the scale of stringency of the new legislation. What is clear is that the valid legislation is less harsh than the first proposal. Still, it is hard to call it “pro-investment.”

In this context, the initial proposal contained criminal penalties for not ensuring the compliance with the drafted legislation in terms of operating the wind power plant without the specific decision issued by the Office of Technical Inspection. According to the first version of the legislation, allowing the operation of a wind power plant without receiving such a decision on allowing the usage of the wind power plant, or on the contrary to the decision of the Office on suspending the operation of the wind power plant was proposed to be punishable by a fine, restriction of liberty or imprisonment up to 2 years. These proceedings were to be run on the basis of the Code of Criminal Procedure. In addition, preventing or hindering the actions of the Office of Technical Inspection concerning an inspection that occurs

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