Assessment of the Polish Act on the Capacity Market

1 Introduction

On 8 December 2017, the Polish parliament adopted the Act on the Capacity Market[1] ("Act"). This study assesses the final design of the capacity market scheme, to which, during the parliamentary legislative process, a number of significant changes have been made. According to the Act, the purpose of the capacity market is to ensure the mid- and long term security of power supply to final customers in a cost efficient, non-discriminatory and environmentally sustainable way[2].

The study is a continuation of ClientEarth's four previous publications that analysed subsequent versions of the Polish capacity market proposal[3]. The previous design of the proposed capacity market was described in the report "The Polish Draft Act on the Capacity Market in light of EU law" of February 2017[4]. Poland's capacity mechanism, from the very first proposal, has been based on the British centrally-managed auctioning scheme. However, the adopted Act contains a number of important differences described below.

The present study is a slightly modified translation of a report that was published in Polish right after the adoption of the Act by the national parliament, in December 2017. The Study contains respectively:

- main conclusions from the analysis (including an attempt to evaluate the impact of such designed scheme on the Polish energy market);
- assessment of the compatibility of the Act with EU law; as well as

[1] All materials related to the parliamentary legislative process of the Act are available on the website: http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=A67FD55CBC3335F8C125815A002572EF (accessed on 21.1.2018).
[2] See Article 1(2) of the Act.
[3] These are respectively, from the most up-to-date study: The governmental Draft Act on the Capacity Market. Legal, environmental and economic questions: https://www.documents.clientearth.org/library/download-info/rzadowy-projekt-ustawy-o-rynku-mocy-watpliwosci-prawne-srodowiskowe-i-ekonomiczne/; Legal risks connected with the capacity market in Poland: https://www.documents.clientearth.org/library/download-info/ryzyka-prawne-zwiazane-z-rynkiem-mocy-w-polsce/; The Polish Draft Act on the Capacity Market in light of EU law: https://www.documents.clientearth.org/library/download-info/the-polish-draft-act-on-the-capacity-market-in-light-of-eu-law/ and The Functional Assumptions of the Capacity Market Design in Poland – A legal and economic analysis (prepared together with the Regulatory Assistance Project, RAP): https://www.documents.clientearth.org/library/download-info/11014/ (all documents accessed on 21.1.2018).
[4] See: https://www.documents.clientearth.org/library/download-info/the-polish-draft-act-on-the-capacity-market-in-light-of-eu-law/ (accessed on 21.1.2018).

- brief presentation of the most important amendments that have been made during the parliamentary legislative process.

2 Main conclusions

- The Act, in contrast to all the previous versions of the capacity market proposal, seems to meet the conditions laid down in the Communication from the Commission "Guidelines on State aid for environmental protection and energy 2014-2020"[5] ("EEAG"). Many amendments have been made to the proposal, resulting in particular from discussions with the European Commission ("EC") during pre-notification contacts[6] (the first draft proposal was submitted to the EC in 2016). Therefore, the probability of the Commission's approval of the adopted scheme is very high.
- The most significant change, i.e. the removal of the so-called auction "baskets" (in fact the removal of provisions on possible different clearing prices for new, modernised or other capacity market units)[7] is compatible with the foundation of a capacity market as a mechanism aimed at guaranteeing only the necessary reserves in the Polish Power System ("PPS") and reduces the risk of Poland investing in additional new coal-fired power units, which – in the long term – would be the most climate disruptive scenario of the development of the PPS[8].
- As these amendments mean that an auction always ends with one clearing price, the monetary cost of the capacity market for final customers may increase, because capacity providers (electricity undertakings) from the existing, amortised power units will be paid the same remuneration as completely new (planned) installations. On the other hand, overall capacity market costs should be reduced due to the foreign capacities' participation in the scheme.
- Capacity market costs will of course depend on clearing prices of particular auctions, while the clearing prices should reflect potential challenges for ensuring generation adequacy. For instance, in the British capacity market clearing prices ranged so far between GBP 6.95[9] and GBP 22.50/kW/year[10].
- Irrespective of the above, according to the data from the Polish Ministry of Energy, the removal of the abovementioned, separate auction "baskets" for new or modernised generators may lead to a PLN 1 bn (approx. EUR 250 mln)[11] higher monetary cost of the capacity market in the first delivery year (i.e. 2021)[12]. The total value of capacity levy to be paid by final customers resulting from the first main auction (to be held in October 2018) based on a single clearing price is projected by the Ministry to amount to around PLN 6.4 PLN bn (approx. EUR 1.5 bn)[13].

[5] OJ C of 2014, No. 200, p. 1. The EEAG are available on the website: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628(01)&from=EN (accessed on 21.1.2018).
[6] See: https://legislacja.rcl.gov.pl/docs//2/12292758/12396049/12396050/dokument315693.pdf (accessed on 21.1.2018).
[7] This rule does not apply to foreign capacity market units. See more below.
[8] See: http://www.chronmyklimat.pl/download.php?id=424 (accessed on 21.1.2018).
[9] In case of the Early Capacity Auction for delivery in 2017/18. See: https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/EA%2017-18%20Final%20Results.pdf (accessed on 21.1.2018).
[10] In case of the T-4 Capacity Auction for delivery in 2020/21. See: https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/Final%20Results%20Report%20-%20T-4%202016.pdf (accessed on 21.1.2018).
[11] Assumed an exchange rate of EUR to PLN = 4.17.
[12] See: Energy Department of the Ministry of Energy, Technical-economic analysis connected with the planned implementation of the capacity market in Poland, May 2017: https://legislacja.rcl.gov.pl/projekt/12292758/katalog/12396049#12396049, p. 8 (accessed on 26.6.2017).
[13] Ibidem.

- Based on net costs, i.e. taking into account the assumed reduction of wholesale electricity prices as a consequence of establishment of the capacity market (the Ministry of Energy projects that wholesale prices should reduce by approx. PLN 1.5 bn/year)[14], the cost of the capacity market may be approx. 25 per cent higher than costs presented in the Regulatory Impact Assessment ("RIA") to the Draft Act that has been brought to the parliament and amount to approx. PLN 5 bn (approx. EUR 1.2 bn)/year[15]. The net monetary cost of the scheme as presented in the RIA amounted to approx. PLN 4 bn/year, however the Draft Act included the possibility of distinguishing separate auction "baskets" for new or modernised generators[16].
- The projected monetary cost of the Polish capacity market is substantially higher than the actual costs of comparable mechanisms[17] in Member States such as the United Kingdom and France. Annual costs of those countries' capacity mechanisms, resulting from auctions that have been held so far, have been very similar (i.e. between PLN 4 and PLN 5.5 bn/year)[18] to the projected costs of the Polish scheme, however regarding two- (in case of the UK) or four times (in France) bigger volumes of capacity procured[19].
- With regard to capacity market costs one should also take into account that:
  - the capacity levy, as with all other components of the electricity bills, will also be charged with value added tax (at present the basic VAT rate in Poland is 23 per cent);
  - the Act provides that, in case of multiannual capacity agreements, the value of remuneration for the fulfilment of the capacity obligation will every year be increased by the rate of inflation;
  - in the counterfactual scenario of a single-commodity market (energy only market, EOM), which in reality in Poland would be "combined" with various existing State aid mechanisms targeted at particular segments of the power market (the so-called EOM plus)[20] an increase of costs to be incurred by final customers because of generation adequacy challenges should be at a comparable level.
- The scheme, as compared with previous proposals, is characterised by more features of a competitive market and should be less vulnerable to political influence. This is in particular because of the removal from the final Act of the possibility of laying down different technical and economic parameters in subsequent regulations of the Minister of Energy (those parameters may have been different for particular generation technologies and if they were not met, the capacity provider would not have been able to conclude a multiannual capacity agreement). Instead, the possibility of concluding multiannual

[14] Ibidem.
[15] Ibidem.
[16] See the RIA, table 7 on p. 12. The RIA is available on the website: http://orka.sejm.gov.pl/Druki8ka.nsf/0/0DA75A28A5C59A9FC1258159004D36FB/%24File/1722.pdf (accessed on 21.1.2018).
[17] I.e. volume-based, market-wide capacity mechanisms.
[18] For the purpose of this comparison the assumed exchange rate of EUR to PLN = 4.17 and the exchange rate of GBP to PLN = 4.75. See: http://www.nbp.pl/home.aspx?f=/kursy/kursya.html (accessed on 21.1.2018).
[19] For instance, in case of the UK's "most expensive" main capacity auction so far (held in 2016, for the delivery year 2020/2021) the clearing price was GBP 22.50/kW/year, while the aggregate capacity of capacity market units awarded capacity agreements was approx. 52.5 GW. As a result, the total cost of those capacity agreements may be estimated at approx. PLN 5.5 bn. See: https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/Final%20Results%20Report%20-%20T-4%202016.pdf (accessed on 21.1.2018). Furthermore, the reference price in case of the first auction of French capacity guarantees was EUR 9.99/kW/year. In this auction capacity guarantees corresponding to a total power capacity of approx. 22.6 GW were traded, however the total volume of capacity certified by the French Transmission System Operator RTE amounted to approx. 93 GW. Therefore, it may be assumed that the total cost of the French capacity market in 2017 was approx. PLN 4 bn. See: http://www.epexspot.com/en/press-media/press/details/Press/show_detail/36738 and https://www.raponline.org/wp-content/uploads/2017/05/raczka-capacity-market-poland-nowoczesna-2017-may-05.pdf (accessed on 21.1.2018). At the same time, the Polish Ministry of Energy has modelled that the clearing price in case of the first main capacity auction may be between PLN 268 and PLN 279/kW/year, while the projected aggregate capacity of capacity market units awarded capacity agreements is approx. 24 GW. See: Energy Department, Technical-economic analysis, op. cit., p. 8.
[20] The adopted capacity market constitutes a volume-based, market-wide mechanism.

agreements will be conditioned by the level of capital expenditure ("CAPEX") and emission limit values[21]. However, on the other hand more features of a competitive market may result in greater uncertainty and higher valuation risk by auction participants and, consequently, lead to increased costs of the scheme.

- The Act, in contrast to the previous proposals, includes provisions giving preference to lower emission capacity technologies. Such preferences[22] apply to:
  - demand side response ("DSR");
  - storage;
  - new or modernised generators meeting an emission performance standard ("EPS") of 450 g CO_2/kWh of energy, i.e. in particular:
    - combined cycle gas turbines ("CCGTs") or open cycle gas turbines ("OCGTs"),
    - combined heat and power ("CHP"), regardless of the fuel used (the EPS should also be met by all new and modernised coal-fired CHP)[23].

  These preferences should be evaluated very positively. However, capacity providers operating potential (planned) low-carbon power units will have to compete with existing generation assets (in particular with the relatively cheap coal-fired power plants). This raises justified doubts regarding the scale of participation of such projects in the capacity market, especially in the first phase of implementation of the scheme.
- It seems unlikely that, absent the introduction of a strict EPS on all participating units, the capacity market will become a measure enabling a substantial reduction of the mean emission factor of the PPS[24] (bearing in mind that while the capacity market will be fundamental, it is but one of many elements of electricity market design in Poland)[25].
- The Act may contribute to the development of energy demand management (demand side management, DSM) in two ways. First, DSR units may participate in capacity auctions. Secondly, DSM may develop because of the innovative method of calculating the capacity levy in case of final customers other than household customers. The value of the paid capacity levy for such customers will be calculated on the basis of the volume of electricity consumed from the grid during given peak hours that shall be specified separately for the respective quarters of the year[26] (i.e. customers shifting their electricity use will pay a lower capacity levy).
- Notwithstanding the above, the main beneficiaries of the adopted mechanism will be existing power plants that will receive the same remuneration (per MW/year) as new capacity market units. The amount of the remuneration for the fulfilment of the capacity obligation in case of existing generators will likely be higher than it would have been in a capacity market containing separate auction "baskets". It is also worth noting that the Act provides that existing generators which started generating electricity after 1 July 2017 are treated as new capacity market units and, therefore, are entitled to conclude multiannual capacity agreements. Such preference applies in particular to the newly built 1075-MW

[21] See more below.
[22] See more below.
[23] Data on emission performance of particular generation technologies according to: http://www.chronmyklimat.pl/download.php?id=424, p. 15 (accessed on 21.1.2018). However, it should be mentioned that, according to the Act, the actual EPS of a capacity market unit must be confirmed by an independent, external expertise.
[24] With regards to this see: http://www.pkee.pl/upload/files/A_Report_for_the_Polish_Electricity_Association_FTI.pdf, p. 65 et seq (accessed on 21.1.2018).
[25] As the other measures that may influence decarbonisation of the PPS should be mentioned in particular: the EU Emissions Trading Scheme (ETS), the newly approved by the EC auctioning support scheme for renewable energy or a planned financial aid measure for the Poland's first nuclear power station.
[26] One should assume that these will be early afternoon hours in the summer and evening hours in the winter. The exact peak hours are to be published by the national Energy Regulatory Office.

hard coal-fired power unit at Kozienice Power Station[27] (i.e. the biggest hard-coal fired power station in the EU) that will be eligible to conclude a capacity agreement for up to 15 years[28].

- The Act should be considered as a more progressive generation adequacy measure as compared with the British capacity market, which the Polish mechanism has been based on since the very first draft proposal[29]. In particular, the Act – in contrast to the British scheme from 2014[30] – provides for:
  - multiannual capacity agreements for DSR (for up to 5 years);
  - preferences to low-carbon generators; and
  - direct participation of capacity providers located in other Member States, including foreign DSR (including also aggregated DSR units, i.e. units consisting of many smaller DSR capacities).
- The analysis of changes in the Polish capacity market proposal, as compared with the other capacity mechanisms approved by the EC under the EEAG, leads to a general conclusion that the EC – which has the sole competence to approve State aid – tends to interpret the legal conditions for the approval of aid for generation adequacy[31] in an increasingly strict manner and would not approve any measure if all the conditions laid down in the EEAG are not met.
- The same rule can be applied to approving other Polish State aid measures for environmental protection and energy, such as the recently approved (almost 3 years after adoption) auctioning support scheme for renewable energy or a planned, new scheme for high-efficiency CHP. National measures should fully reflect EU State aid law from the very first proposal, to enable faster and more efficient implementation of a given aid measure.
- The changes made to the Act are the result of extensive consultations by the Polish Ministry of Energy on the capacity market proposal, both at the national and EU level (i.e. with the EC). Such practice of additional public consultations has not been standard so far in the field of Poland's national energy regulations (in particular regarding renewable energy sources, RES) and it would be highly recommended to apply such standards also in the other fields of energy law.

3 The Act on the Capacity Market in light of EU law

In the reports mentioned in the introduction to this study[32], ClientEarth raised the possibility that the proposed capacity market would not be compatible with the EU internal market. The analysis of the final version of the Act leads to the conclusion that virtually all legal inconsistencies from the previous proposals have been improved. Below is the list of ClientEarth's previous objections towards the draft capacity market proposal and the way these issues are addressed in the final version of the scheme.

[27] This unit was officially transferred to operation on 19 December 2017. See: https://www.polimex-mostostal.pl/en/press-centre/news/nowy-blok-energetyczny-grupy-enea-o-mocy-1075-mw-oddany-do-eksploatacji (accessed on 21.1.2018).
[28] As a rule, the existing, non-modernised generators may conclude a capacity agreement for one delivery year.
[29] See: http://www.me.gov.pl/files/upload/26170/Projekt%20rozwi%C4%85za%C5%84%20funkcjonalnych%20rynku%20mocy_final.pdf (accessed on 21.1.2018).
[30] See: http://ec.europa.eu/competition/state_aid/cases/253240/253240_1579271_165_2.pdf (accessed on 21.1.2018).
[31] Specified in point 3.9 of the EEAG.
[32] See in particular the report: The Polish Draft Act on the Capacity Market in light of EU law, op. cit.

3.1 Possible failure to ensure the participation of a sufficient number of generators to establish a competitive price for the capacity

- This objection referred to particular main auctions which would have different clearing prices for new or modernised generators and is no longer valid because the Act has been improved through the removal of the so-called auction "baskets".
- According to the changed capacity market design, all auction participants shall compete in the exact same auction that ends with the same clearing price. Hence, the adopted measure shall be considered as a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria[33]. Capacity pricing will be much less dependent on political influence and administrative decisions of the Minister of Energy.
- The only exception to the rule of one clearing price has been provided for capacity providers from units located in other EU Member States. The value of capacity obligations for such units may be lower than the clearing price of the relevant auction[34], because – according to the Act – in case of foreign capacity market units the price of capacity is the highest price in the exit offer regarding a capacity market unit that is subject to the capacity obligation located in a bidding zone covering:
  - part of Germany, the Czech Republic and Slovakia;
  - Lithuania; and
  - Sweden, respectively.

3.2 Discriminatory treatment of DSR

- This objection is no longer valid due to:
  - the possibility of concluding multiannual capacity agreements (for up to 5 years[35]) by new (planned) DSR units[36]; and
  - allowing participation in the Polish capacity market by DSR units located in neighbouring Member States, including aggregated foreign DSR (power demand reduction abroad should be viewed as equivalent to electricity export to Poland).

3.3 Taking insufficient account of capacity providers from other Member States

- This legal defect of the capacity market proposal is no longer valid because the adopted Act provides for the full participation of capacity units located in the EU power systems directly connected with the PPS.
- The Act provides for two types of foreign capacities' participation in the capacity market:
  - an indirect one, through interconnectors; or
  - directly by power units located in the neighbouring Member States, including foreign DSR.

[33] See point 229 of the EEAG.
[34] The price for foreign capacities may be the same as the clearing price of a given main or supplementary capacity auction, but it cannot be higher than the clearing price, because the price concerned must not relate to a power unit that is not bound by capacity obligation.
[35] However, according to the Act, new generators may conclude capacity agreements for up to 17 years.
[36] Under the British capacity marker even the new DSR units may conclude only a year-long capacity agreement.

3.4 Lack of preference to low-carbon generators (in case of equivalent technical and economic parameters)

- This legal defect is no longer valid due to:
  - the addition of a new rule that, in case of same bids, gives preference to generators with lower EPS;
  - the possibility of concluding two-year longer capacity agreements in case of new and modernised generators meeting the EPS of 450 g CO_2/kWh per unit of energy, as compared with the other power units, i.e. agreements for a maximum of 17 or 7 years (the so-called “green bonus”).

3.5 New measure enabling the award of environmentally harmful subsidies

- In the PPS, where at present approx. 75 per cent of total capacity is installed in hard coal- and lignite-fired power plants[37], the adoption of any market-wide capacity mechanism would in practice entail the establishment of a new aid measure enabling the award of environmentally harmful subsidies. At the same time, among the objectives of the EEAG is indicated “phasing out environmentally harmful subsidies including for fossil fuels”[38].
- However, the above should not be perceived as an autonomous legal basis preventing the adoption of a capacity mechanism by a given Member State, if other conditions specified in the EEAG are met. This refers in particular to considering by the Member State concerned alternative ways of achieving generation adequacy, such as:
  - facilitating DSR; and
  - increasing interconnection capacity[39].
- With regards to the comments made in points 3.2 and 3.3 above, as well as other circumstances (such as the implementation, in 2017, of a new aid measure for stand-by DSR)[40] one may assume that Poland has considered alternative ways of achieving generation adequacy (and eventually included them as an important element of the capacity market itself).

3.6 Possibility of generating new stranded costs

- This potential defect of the Act, from a legal point of view, first of all depends on the final shape the EC’s “Clean Energy for All Europeans” legislative package[41], in particular on final provisions of a proposal for a revised Regulation on the internal market for electricity ("IEM Regulation")[42]. Such a regulation shall be binding in its entirety and directly applicable in all Member States[43]. The exact contents of particular legislative proposals

[37] See: https://www.pse.pl/raporty-za-rok-2016#t1_1 (accessed on 21.1.2018).
[38] See point 220 of the EEAG.
[39] Ibidem.
[40] See: https://www.pse.pl/-/przetarg-na-uslugi-dsr-zakonczony-sukcesem-? (accessed on 21.1.2018).
[41] See more: https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition (accessed on 21.1.2018).
[42] The EC’s proposal for the amended IEM regulation is available on the website: http://eur-lex.europa.eu/resource.html?uri=cellar:9b9d9035-fa9e-11e6-8a35-01aa75ed71a1.0012.02/DOC_1&format=PDF (accessed on 21.1.2018).
[43] See Article 288 of the Treaty on the Functioning of the European Union, OJ C of 2012, No. 327, p. 47, as amended.

from this package have been and will be the subject of negotiations and voting in the Union's institutions.

- It should be noted that, as for today, in the EU law system there are no binding provisions regarding State aid for generation adequacy other than the EEAG. Therefore the Act should in principle be assessed by the EC on the basis of these Guidelines. However, it should be taken into account that the EU law may and probably will change during the functioning of the Polish capacity market.
- However, the EC should not approve State aid that may be violating soon to be adopted EU law. Considering that the EC's proposal for a revised IEM Regulation contains provisions stating that generation capacity emitting 550 g CO_2/kWh or more shall not be committed in capacity mechanisms and the investigated aid measure will still be in place after the adoption of the new EU legislation, the approval decision should contain a clause that will provide for a review of the capacity market once the "Clean Energy" package is adopted.
- With regards to the above, one has also to bear in mind that the EC must issue the new guidelines on State aid for energy-related issues, since the current EEAG expires with the end of 2020[44].

4 Most important amendments adopted during the parliamentary legislative process

Among the most important changes to the Act that were adopted in parliament, and which are important from the perspective of compatibility of the capacity market with the internal market and existing EU State aid law, are the following:

- the removal of the so-called auction "baskets", i.e. the removal of possibility that a given main capacity auction may end with different (higher) clearing prices for new or modernised generators;
- the removal of possibility of laying down different technical and economic parameters: this makes the scheme more market-based, but on the other hand it may in practice give preference to the cheapest coal-fired units;
- foreign capacities may participate in the capacity market from the first delivery year (i.e. 2021)[45];
- the rules of participation for foreign capacities have changed: preliminary auctions instead of the previously proposed ticket auctions (which were similar to those existing in the French capacity mechanism) should be a less complicated and more attractive form of participation in the capacity market in case of capacity providers from units located outside Poland;
- direct inclusion of interconnectors in the capacity market;
- the addition of a new auction parameter concerning the maximum volume of capacity obligation for given zones, where foreign power units participating in the capacity market are located;
- the possibility of aggregation also within foreign DSR units (such units consist of many smaller entities and may participate in the capacity market if their total capacity is at least 2 MW);

[44] This remark refers to potential changes in the capacity market made after 2020.
[45] Under the previous version of the Draft Act, the first delivery year in case of foreign capacity providers would be 2025.

- required period of a capacity market unit's availability has been shortened from 15 to 4 consecutive hours (4 hours is a power storage discharge curve);
- the addition of a new category of capacity providers in the form of new (planned) DSR units, which may conclude multiannual capacity agreements for up to 5 years[46];
- emission standards covering not only generators, but also DSR[47];
- the addition of a new rule that, in case of same bids, gives preference to generators with lower EPS;
- CHP units, as in contrast to conventional generators, will be able to offer part of their capacity volume in a main T-5 auction and the other part of their capacity volume in the supplementary auction concerning the same delivery period;
- the possibility of concluding multiannual agreements (in case of new and modernised generators as well as planned DSR units) will be dependent on meeting the level of CAPEX that is to be specified in a regulation of the Minister of Energy:
    - according to the information provided by the officials from the Ministry during a meeting of the special parliamentary Subcommittee on the Draft Act on the Capacity Market[48] it is assumed that:
        - new generators undertaking CAPEX of at least PLN 3 mln/MW may conclude capacity agreements for up to 15 years,
        - new and modernised generators as well as planned DSR undertaking CAPEX between PLN 0.5 and 3 mln/MW may conclude capacity agreements for up to 5 years;
- the so-called “green bonus” for new and modernised generators meeting the EPS of 450 g CO_2/kWh in the form of two years longer capacity agreements as compared with the other power units, i.e. agreements for up to:
    - 17 instead of 15 years in case of some new generators (in particular new CCGTs),
    - 7 instead of 5 years in case of some new or modernised generators (in particular OCGTs)[49];
- the possibility of concluding a multiannual capacity agreement will depend on meeting given emission requirements[50];
- multi-fuel firing (co-firing) installations using both renewable and non-renewable fuels will be able to participate in the auctioning support scheme for renewable energy and, at the same time, in the capacity market (as regards the volume of power that is not generated from biomass):
    - according to the previous versions of the capacity market proposal, co-firing power plants would be eligible to participate in the capacity mechanism only if they

[46] According to all previous versions of the capacity market proposal, as in case of the British scheme, DSR units were entitled to offer only a year-long capacity obligation.
[47] In case of generators located behind the meter.
[48] See: http://www.sejm.gov.pl/Sejm8.nsf/transmisje_arch.xsp?unid=9832CE0AE5AAC32EC12581C600269575 (accessed on 21.1.2018).
[49] The literal wording of the Draft Act before the second hearing in the lower chamber of the Polish parliament implied the possibility of concluding capacity agreements for up to 7 years also in case of planned DSR units (it would be technically possible in case of DSR units consisting of a low-carbon generator located behind the meter). However, it eventually turned out that the actual will of the authors of the proposal was different and the Act was amended in such a way that the “green bonus” applies only to “pure” generation units.
[50] Regarding emission performance requirements resulting from the directive 2010/75/EU on industrial emissions (OJ L of 2010, No 334, p. 17, as amended) or the directive (EU) 2015/2193 on the limitation of emissions of certain pollutants into the air from medium combustion plants (OJ L of 2015, No 313, p. 1).

simultaneously benefit from the previous certificates of origin system or do not take part in any support scheme for renewable energy[51],

- it may show that Polish authorities assume that in the future co-firing installations will participate in the RES auctioning scheme[52], while in 2016 Poland committed to the EC that the country "adopted new priorities in the national RES development policy and aims to limit the development of co-firing installations and incentivize the development of other RES technologies"[53];

- the addition of a specified schedule of auctions:
  - according to the adopted Act, the last auction is to be held in 2025 (for the delivery year 2030), which means that the last capacity agreements may expire with the end of 2046,
  - it corresponds to the EU State aid law and previous practice of the EC that authorises an aid scheme for a maximum period of 10 years[54];
- annual reporting on the functioning of the capacity market to the EC.

[51] What is interesting, in the Act there is no provision excluding the participation of domestic generators being simultaneously granted operating aid for cogeneration (if such a scheme would apply in Poland after 2020). At the same time, in the capacity market shall not participate foreign power units that in the same delivery year benefit from an aid for cogeneration.
[52] At present in Poland there is none such an installation.
[53] See: Decision of the EC of 2.8.2016, C(2016) 4944 final, point 223, http://ec.europa.eu/competition/state_aid/cases/261395/261395_1832252_133_2.pdf (accessed on 21.1.2018).
[54] See Decision of the EC of 23.7.2014, C(2014) 5083 final, point 162, http://ec.europa.eu/competition/state_aid/cases/253240/253240_1579271_165_2.pdf (accessed on 21.1.2018). After that period a Member State can re-notify the measure if the Member State re-evaluates the appropriateness of the aid measures concerned.

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