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POLISH CONCESSION FEE ON OFFSHORE WIND FARMS: A QUASI-TAX HIDDEN IN THE ENERGY LAW

Summary. The production of electricity using offshore wind farms is at a preparatory stage in Poland. However, it has the opportunity to become the most dynamically-developing segment of the power industry, especially considering ambitious targets for reducing CO₂ emissions. The development of the renewable energy sector in Poland has major real estate tax context when one takes into account that RET paid for the infrastructure projects constitutes an important source of tax revenue for the local communities. The taxation of wind farms is a well-recognised issue, but jurisprudence developed in this area cannot help in solving the problem of the taxation of the offshore wind farms. A legal loophole in the Polish RET provisions made it impossible to tax the offshore constructions. In order to capture the tax from offshore wind farms, the Polish legislator introduced a special concession fee, whose amount is approx. equal to the hypothetical RET to be paid from the wind farm if it was located onshore. The purpose of the article is to present the doubts regarding the offshore concession fee from the perspective of Polish constitutional standards as well as the Polish tax system consistency.

Keywords: offshore, real estate tax, wind farms, property taxation, concession fee, energy transformation

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1. INTRODUCTION

Poland still depends on coal as its primary energy source. However, due to ambitious targets for reducing CO₂ emissions¹, Poland must move away from coal-fired power generation. Wind energy has good prospects in Poland (due to favourable natural conditions)², which is reflected by the increasing levels of investment in this sector by the largest Polish and global energy companies. Given the risks of conflicts with local communities in cases of onshore investments, the construction of offshore wind farms would appear to be an ideal solution. During the transition from 2020 to 2021, Poland witnessed significant changes in legal regulations, which were designed to create a favourable environment for investments in offshore wind farms. One aspect of these changes was a new quasi-tax covering offshore wind farms. Usually, low-emission energy development is associated with tax preferences for investors. However, in the case presented here, low-carbon energy could be perceived as a potential source of government revenue. The production of electricity using offshore wind farms is at a preparatory stage in Poland. However, it has the opportunity to become the most dynamically-developing segment of the power industry, which is not surprising given the context of the European market³.

2. POLISH PROPERTY TAX – WHAT IS IT ALL ABOUT?

In the Polish tax system, taxation of property has been entrusted mainly to the property tax [Pol. *podatek od nieruchomości*] regulated in the Act of 12th January, 1991, on Local Taxes and Fees⁴. Land, buildings, and structures

¹ D. Hasterok, R. Castro, M. Landrat, K. Piko, M. Doepfert, H. Morais, *Polish Energy Transition 2040: Energy Mix Optimization Using Grey Wolf Optimizer*, “Energies” 2021, no. 14(501), <https://doi.org/10.3390/en14020501>

² G. Wiśniewski, K. Michałowska-Knap, S. Koć, *Energetyka wiatrowa – stan aktualny i perspektywy rozwoju w Polsce [Wind energy – current status and development prospects in Poland]*, Warszawa, 2012, https://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/senat/zespoly/energia/raport.pdf

³ See also J. Similä, N. Soininen, E. Paukku, *Towards sustainable blue energy production: an analysis of legal transformative and adaptive capacity*, “Journal of Energy & Natural Resources Law”, vol. 40, no. 1, pp. 61–81, <https://www.tandfonline.com/doi/full/10.1080/02646811.2021.1875687?src> (access: 20.08.2023).

⁴ Journal of Laws 2023, item 70 as amended, hereinafter cited as: “Local Taxes and Fees Act”.

are subject to this⁵ tax, which is primarily paid by their owners (and their holders in selected cases)⁶. For land and buildings, property tax is levied on their surface area⁷, whereas it is levied on their value for structures. Generally, the initial value is adopted for tax depreciation purposes, which is not reduced by depreciation write-offs⁸. If depreciation allowances are not made on structures, the taxable amount is their market value on the date when the tax obligation arises⁹. Hence, the taxable amount is the historical value of the structure in both cases, which is not reduced annually due to progressive wear and tear. This means that in a situation where there is no significant inflation, the decrease in the real value of the taxable item (resulting from wear and tear and technological development) is not accompanied by a commensurate decrease in the tax burden. The provisions of the Act on Local Taxes and Fees define the maximum rates of property tax on land, buildings (specific rates per unit area), and structures. However, individual municipalities may set tax rates at a level lower than the maximum rates. It is worth noting that while many municipalities decide to introduce rates lower than the maximum rates allowed by the Act for land and buildings (especially when not used for a business activity), the rule for structures is to set the rate at the maximum level permitted by the Act (i.e. 2% per year on the value).

The legal definitions of buildings and structures (subject to property tax) are contained in the provisions of the Act on Local Taxes and Fees. However, this includes a reference to the notion of a construction object regulated in the provisions of the Act of 7th July, 1994, Construction Law¹⁰. Thus, a building is understood to be a construction object within the meaning of the Construction Law which is permanently connected with the ground, separated from the space by means of building partitions, and has foundations and a roof. A structure, in turn, is a construction object within the meaning of the provisions of the Construction Law which is not

⁵ Art. 2(1) of the Local Taxes and Fees Act.

⁶ Art. 3 of the Local Taxes and Fees Act.

⁷ Art. 4(1)(1) and (2) of the Local Taxes and Fees Act.

⁸ Art. 4(3) of the Local Taxes and Fees Act.

⁹ Art. 4(5) of the Local Taxes and Fees Act.

¹⁰ Journal of Laws of 2023, item 682 as amended, hereinafter cited as the “Construction Law”. The terms: “*obiekt budowlany*” (English: “construction object”), “*budowla*” (English: “structure”), “*budynek*” (English: “building”) used in the Construction Law and tax regulation do not correspond to their colloquial meanings in Polish.

a building or a small architectural object, as well as a construction device, within the meaning of the Construction Law, connected to a construction object. This ensures the possibility of using the construction object in accordance with its intended purpose. A perusal of the relevant provisions of the Construction Law leads to the conclusion that taxable structures are understood to include, *inter alia*, line structures (e.g. power lines), foundations, construction parts of machines, and technical equipment. It should be noted that the distinction between buildings and structures is the source of many disputes in practice.

3. ENERGY (RENEWABLE) – AN IMPORTANT SOURCE OF TAX REVENUE

Due to the described regulations (particularly those that define the subject and the tax base of constructions), the property tax in Poland constitutes a significant business cost for entrepreneurs operating in manufacturing sectors (including the energy sector). Accordingly, in order to conduct their business activities, they use assets of significant value that qualify as structures. This tax generates an annual cost of 2% of their initial value, which often does not correspond to the market value of the facilities. Further, the property tax generates costs for the taxpayer, regardless of whether the business activity is profitable. In practice, companies operating in the conventional energy field (such as power plants, combined heat and power plants, owners of transmission infrastructure, and coal mines) are among the largest property tax payers in Poland. However, due to the dynamic development of the renewable energy sector, entrepreneurs operating in this industry have also become significant property taxpayers. In their case, the distribution of tax revenue is decentralised. Low-carbon energy installations are usually located in low-urbanised municipalities (often rural) with low levels of industrial development. Therefore, the tax paid on them constitutes a significant source of budget revenue in these municipalities. The fiscal aspect has been the background to numerous disputes between taxpayers and tax authorities in recent years concerning the taxation of wind farms, which were the first large-scale renewable energy sources in Poland. These disputes have also been the source of significant (and sometimes surprising) legislative changes, resulting in either decreases or increases in the tax due on wind farms.

As indicated previously, according to the definition included in the Act on Local Taxes and Fees (interpreted with the Construction Law),

a structure is understood to be many things, including foundations, building parts of machines, and technical equipment. Based on this definition, wind farm owners argued that only the foundations and the tower (and, possibly, the power line connected to the farm) should be subject to property tax, while any electricity generating equipment mounted on them (such as the rotor and nacelle) is not considered a structure. Many tax authorities did not accept this approach, claiming that all elements of a wind farm (both construction and technical) constitute a taxable structure, creating the so-called technical-utility whole. However, because the value of technical facilities on a wind farm is several times higher than the value of its construction parts, the adoption of this tax approach would result in a multiplication of the property tax paid by their owners. As a general rule, Polish administrative courts supported the position of taxpayers in their judgments¹¹. However, to exclude discussions in this respect, the legislator decided to introduce an appropriate amendment to the provisions. On 26th September, 2005, “wind power plants” were explicitly added to the definition of a structure in the Construction Law as examples of technical devices, where only their construction parts constituted a structure.

This *status quo* was violated when the Polish Parliament enacted the Act of 20th May, 2016, on investments in wind power plants¹². As of 1st January, 2017, this Act introduced changes that resulted in multiple increases in property tax on wind farms. In particular, a definition of the structure of a wind power plant was introduced, which included both construction parts and technical elements. Despite serious doubts about the introduced regulations, the Supreme Administrative Court confirmed the interpretation of the regulations. Accordingly, as of 1st January, 2017, the whole wind farm (not only the building parts) is subject to taxation, which equates to a tax increase of several hundred percent¹³. Ultimately, the arguments presented by the renewable energy industry were either economic or constitutional. The former is related to tax increases, rendering the profitability of investments in wind farms

¹¹ Judgments of the Supreme Administrative Court of: 7th October, 2009, II FSK 635/08; 30 July 2009, II FSK 202/08; 16th December, 2009, II FSK 1184/08; 5th January, 2010, II FSK 1101/08.

¹² Journal of Laws 2016, item 724. Despite its name, this Act was referred to as the “Anti-Windfarm Act”, when, in fact, it prevented new wind farms from being built on land.

¹³ Judgment of the Supreme Administrative Court of 22nd October, 2018, II FSK 2983/17.

questionable. The constitutional argument focused on treating the technical equipment of wind farms as taxable constructions, placing their owners in a much worse position than owners of other types of renewable energy sources and representatives of conventional energy. The strength of these arguments convinced the legislator to change the provisions. Therefore, as of 1st January, 2018, the original *status quo* was restored, meaning that only the construction parts of wind farms were subject to property tax¹⁴. However, these disputes only concerned onshore wind farms, as offshore facilities did not exist at that time in Poland.

4. OFFSHORE WIND FARMS – THE TAXATION OF STRUCTURES ON “NO MAN’S LAND”

The possibility of taxing offshore wind farms located outside territorial waters¹⁵ in the exclusive economic zone does not raise major legal questions. This is a result of the possibility of taxation being rather weakly related to the territory of the state. After all, there are no major doubts that the income of a resident of a given state may be taxed by that state, even if it is earned in the territory of another state. Looking at the problem from the perspective of the principles of the taxation of foreign income in different countries, it would probably be possible to tax wind farms located outside the exclusive economic zone when the entities that own them are residents of the taxing state. Moreover, it would not even need to pertain to the owners of the wind farms, as the tax law is not “attached” to the right of ownership. It would be sufficient that a resident of the state derives income from the wind farm for the state of residence to be entitled to taxing the income from these offshore wind farms; hence, the farms themselves would be subjected to wealth tax¹⁶. Although “the taxation of all residents” wealth

¹⁴ This amendment was introduced by the Act of 7th June, 2018, amending the Act on Renewable Energy Sources and certain other acts (Journal of Laws of 2018, item 1276), with retroactive effect from 1st January, 2018, which in turn was challenged (acting on the complaint of municipalities) by the Constitutional Court in its judgment of 22nd July, 2020 (K 4/19).

¹⁵ In Poland, the erection and use of offshore wind farms in internal waters and the territorial sea is explicitly forbidden, which results from the Art. 23 par. 1a of the Act on maritime areas of the Republic of Poland and maritime administration of 21st March, 1991 (Journal of Laws of 2023, item 960), further quoted as the “Act on maritime areas”.

¹⁶ O. Lynne, A. Miller, E. Mulligan, *Principles of international Taxation*, Bloomsbury Professional, 2017, p. 22.

is a rare solution (regardless of where it is located), this is treated as natural in tax law literature.

Sometimes, references are made in the literature to the 1982 UN Convention on the Law of the Sea¹⁷ as the basis for taxing offshore wind farms by that state in whose exclusive economic zone they are located¹⁸. However, it is doubtful that Article 56 of the Convention covers taxing a property. In accordance with the following provision:

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring, and exploiting, conserving, and managing the natural resources, whether living or non-living of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;
 - (b) jurisdiction, as provided for in the relevant provisions of this Convention with regard to:
 - (i) the establishment and use of artificial islands, installations, and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention.

Thus, this regulation only concerns the construction of wind power plants in the exclusive economic zone, and it does not have a taxation aspect. The right to taxation is not limited territorially, meaning that it does not consist, *inter alia*, in physical activity within the zone to which the above-mentioned provision refers. It is not necessary to resolve this issue in the context of the Polish tax law.

5. THE DISPUTE OVER THE TAXATION OF OFFSHORE WIND FARMS – A POLISH DISCUSSION ABOUT NOTHING

The taxation of offshore wind farms has been discussed in the doctrine of the Polish tax law for many years, even before the first real investments in the field appeared¹⁹. Further, being both the tax authorities and the

¹⁷ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

¹⁸ S. Schultes-Schnitzlein, M. Dettmeier, *The Taxation of German Offshore Wind Farms*, “International Tax Review” 2012, no. 23(4), p. 72.

¹⁹ B. Pahl, *Morskie farmy wiatrowe zlokalizowane w wyłączonej strefie ekonomicznej a podatek od nieruchomości* [Offshore wind farms located in the exclusive economic zone and property tax], “Finanse Komunalne” 2013, no. 3, pp. 40–44.

beneficiaries of this property tax, municipalities were very interested in the taxation potential of offshore wind farms. Moreover, especially in this area of investment, the construction part constitutes the tax base of the wind farm structure (which is undoubtedly subject to property tax) and so the tax could reach a very high value due to significant costs related to the foundation of offshore wind farms. The problem here was that the specificity of the local tax regulation meant that offshore wind farms were *de facto* outside the scope of the property tax, even though they are formally classified as structures (which should be subject to property tax).

According to Article 2(1) of the Act on Maritime Areas, the maritime areas of the Republic of Poland are as follows: 1) internal sea waters, 2) the territorial sea, 3) the contiguous zone, and 4) the exclusive economic zone. Further, the territory of Poland comprises internal sea waters and the territorial sea²⁰. *A contrario*, therefore, the exclusive economic zone (in which offshore wind farms are located) is not the territory of Poland. Rather, it comprises artificial islands, structures, and equipment, which is utilised, *inter alia*, for the use of wind for energy purposes, which are subject to Polish law²¹. Accordingly, since structures erected in the exclusive economic zone are subject to the Polish law, they should be considered as a potential subject of property tax. Moreover, offshore wind farms include structures that meet the criteria for a taxable building. However, the problem here is uncertainty over what tax rate should be applied.

The reason for this problem is that property tax is considered a local tax and the law only provides for maximum tax rates. Further, the rates applicable in a given municipality are set by the municipality itself by way of a resolution of the municipal council²². A resolution of the municipal council as an act of local law is a source of universally-binding law only within the territory of a given municipality²³. Accordingly, the rates resulting from the Act cannot be applied here, as this regulation is addressed to municipalities and only constitutes a limitation of their freedom in shaping tax burdens.

It should be noted that the regulations in force would make it possible to determine the competent tax authority in the matter of taxation with property tax on objects of taxation located in the Polish exclusive economic

²⁰ Art. 2(2) Maritime Areas Act.

²¹ Art. 22(2) Maritime Areas Act.

²² Art. 5(1) of the Local Taxes and Fees Act.

²³ Art. 87(2) of the Polish Constitution.

zone. As a rule, the tax authority competent to rule on property tax is the mayor of the municipality [Pol. *gmina*] in which the subject of taxation is located²⁴. There is no municipal body competent for the exclusive economic zone, as it does not constitute a territory of Poland, meaning that it does not fall within the territory of any municipality. Moreover, according to the relevant executive regulations to the Polish Tax Ordinance²⁵, if it is not possible to determine the local competence according to the provisions of the tax law, the competent tax authority in the matter of local taxes is the president of the Capital City of Warsaw²⁶. However, the determination of the competent tax authority would not make it possible to levy the tax when the tax rate is still missing. Officially, Polish courts adhere strictly to the principle that all structural elements of a tax must follow from the law adopted by the Parliament. In cases where a legal loophole is exposed in the act, the courts are inclined to state that it is not possible to levy tax, even if there is no doubt that the given factual situation is subject to taxation. In the case law of the Supreme Administrative Court, the concept of “incompleteness of the legal norm” appears in this case, rendering it impossible to levy the tax²⁷. From the perspective of constitutional standards, such a jurisprudential concept should definitely be assessed positively. Conversely, from the perspective of the fiscal interests of the state and municipalities, this assessment may be different. This is accompanied by a certain concern about preserving the principles of fairness in that certain types of activity remain outside the scope of the rather cumbersome property tax.

6. HOW CAN OFFSHORE CONSTRUCTION TAX BE CAPTURED?

There is no doubt that the existence of a legal loophole related to the taxation of offshore wind farms was not an optimal situation. For many years, this was a problem with no negative consequences for either public finances or for respecting the principle of the equality of entrepreneurs in the absence of offshore wind farms in the Polish exclusive economic zone.

²⁴ Art. 1c, Article 6(7) and (9) of the Local Taxes and Fees Act.

²⁵ Tax Ordinance Act of 29th August, 1997, Journal of Laws of 2020, item 1325, as amended.

²⁶ § 10 of the Regulation of the Minister of Finance of 22nd August, 2005, on the jurisdiction of tax authorities (Journal of Laws 2019, item 2371).

²⁷ Judgement of the Supreme Administrative Court of 17th November, 2014, II FPS 4/14.

However, concrete investment plans announced by energy corporations in 2019 motivated the Polish legislator to address this problem. Indeed, investments in offshore wind farms located in the Polish exclusive economic zone have attracted strong interest from the largest Polish and global energy companies. For example, joint projects have been initiated by Polenergia (Poland) and Equinor (Norway), *Polska Grupa Energetyczna* (Poland) and Orsred (Denmark), as well as Orlen (Poland) and Northland Power (Canada).

In addition, individual projects have been implemented by Germany's RWE and France's EDPR and Engie²⁸. The Polish authorities are planning to hold four more auctions for new offshore projects in 2025, 2027, 2029, and 2031²⁹.

The starting point for the work on amending the regulations was the conviction that offshore wind farms should not escape property taxation. First, this resulted in inequality in relation to onshore wind farms (as well as other onshore energy sources), where property tax is a significant cost of economic activity³⁰. Second, it deprived the budget of important tax revenues. Accordingly, the only way forward was to find a way of taxing offshore wind farms.

One method for solving this problem could be the introduction of appropriate amendments to the provisions of the Act on Local Taxes and Fees or the Tax Ordinance, which would define the competence of the municipal council in cases where local competence cannot be established according to the general rules. Similar to the case where determining the competence of the tax authority in the absence of local competence resulted in the president of the Capital City of Warsaw being assigned, the council of Warsaw could be deemed the council of the municipality competent to adopt tax rates for objects of taxation located in the exclusive economic zone. However, such a solution could raise doubts from the perspective of compliance with the Constitution. In Poland, a resolution of the municipal

²⁸ <https://www.ure.gov.pl/pl/urzed/informacje-ogolne/aktualnosci/9595,Offshore-Prezes-Urzedu-Regulacji-Energetyki-rozpatrzył-ostatni-wniosek-w-ramach-.html>.

²⁹ <https://www.rechargenews.com/wind/local-players-sweep-the-board-in-polands-latest-offshore-wind-round/2-1-1461658>

³⁰ *Uzasadnienie do projektu ustawy o promowaniu wytwarzania energii elektrycznej w morskich farmach wiatrowych z 23 grudnia 2019 r.* [Explanatory Memorandum to the Draft Law on Promoting Electricity Generation in Offshore Wind Farms, 23rd December, 2019], <https://legislacja.gov.pl/projekt/12329105/katalog/12656009#12656009> (access: 15.04.2021).

council is an act of local law. However, in line with Art. 87(2) of the Polish Constitution, acts of local law constitute a source of law exclusively within the area in which the given municipal council operates. Accordingly, the Polish exclusive economic zone (which is not considered a territory of Poland) is not an area in which the council of the Capital City of Warsaw (or any other municipal council) operates. In addition, a tax authority other than the tax authority of the municipality of Warsaw would operate on the basis of such an act of local law. Thus, one municipality would decide on the revenue levels of other municipalities.

Another possible solution could be the introduction of a provision specifying the tax rate applicable to structures located in the Polish exclusive economic zone (i.e. without the necessity of referring to the resolution of the municipal council) directly into the Act on Local Taxes and Charges. In such a case, the tax would (as an exception) be calculated based on the statutory rate. However, the authority competent to collect the tax would be the mayor of the Capital City of Warsaw, who would generate income on this account. This solution could raise doubts from the perspective of systemic compatibility. This is because property tax is a local tax; hence, the competence to establish its amount resides with local self-government units, which follows directly from the Constitution³¹. Admittedly, the Constitution stipulates that they only have this power “to the extent specified in the Act”. However, thus far, the legislator has always given local governments this power with respect to taxes they collect themselves. Moreover, the question becomes whether it would be fair for Warsaw (which is not even located by the sea) to receive tax revenue from offshore wind farms. Another option would be to accept the legal fiction that the exclusive economic zone is the area of coastal municipalities. However, even if these legal doubts were disregarded, such a solution would always engender practical problems related to tax assessment.

Finally, the third method of taxing offshore wind farms could be to introduce a completely new tax (not a local tax); this would not require the adoption of rates set by the municipality council. The advantage of this solution would be not interfering with the existing tax regulations while achieving the desired fiscal effect. This is precisely the solution that was originally adopted in the draft law on the promotion of electricity

³¹ Article 168 of the Polish Constitution: Local self-government units shall have the right to determine the amount of local taxes and charges to the extent determined by law.

generation in offshore wind farms of 23rd December, 2019³², whose author was the Minister of State Assets and not the Minister of Finance (which is interesting in itself). The aim of this project was the introduction of a “tax on offshore wind farms”, the subject of which would be the conduct of economic activity in the field of electricity generation in an offshore wind farm. The resulting tax base would emanate from the concession of the installed electrical capacity of the offshore wind farm, while the tax rate was to be set as a lump sum of 23,000 PLN per 1 MW. The tax was to constitute state budget revenue, and the competent tax authorities were to be the tax administration authorities considered competent according to the place of residence of the taxpayer (not the place of location of the offshore wind farm).

A number of comments were made pertaining to the draft during the public consultation³³. The most frequent of these concerned the mechanism for the annual adjustment of the flat tax amount contained in the provisions. The objectors pointed out that provisions on property tax do not provide for the valorisation of the tax rate on structures³⁴. In general, the tax base is the initial value of a structure for tax depreciation purposes and remains unchanged. However, according to the intention of the authors of the legislation, the amount of tax on offshore wind farms should correspond to the amount of property tax paid on land-based power plants. Hence, the introduction of the valorisation mechanism was indeed illogical. Another issue revealed when the draft was analysed was entrusting the competence to issue a *de facto* decision determining the amount of the tax base to a non-tax authority (the President of the Energy Regulatory Office issuing an energy production concession). This could not be challenged by a taxpayer before the competent tax authority (who is bound by the content of the concession)³⁵. While the project to introduce a new tax did not appear to materialise, this happened under a different name.

³² <https://legislacja.gov.pl/docs//2/12329105/12656009/12656010/dokument434588.pdf> (access: 12.04.2021).

³³ <https://legislacja.gov.pl/projekt/12329105/katalog/12656009#12656009> (access: 15.04.2021).

³⁴ The maximum rate provided for by the Local Taxes and Fees Act is 2% of the tax base.

³⁵ M. Ruta, *Podatek od morskich farm wiatrowych – proponowany model opodatkowania inwestycji offshore* [Tax on Offshore Wind Farms: A Proposed Model for Taxing Offshore Investments], “Przegląd Podatkowy”, 2020, no. 6, p. 58.

7. INSTEAD OF A TAX – A CONCESSION FEE

Many of the previous remarks were considered in the governmental draft of the Act on the Promotion of Electricity Generation in Offshore Wind Farms, which was finally submitted to the Parliament and adopted as the Act of 17th December, 2020, on the promotion of electricity generation in offshore wind farms³⁶. The new concession fee is regulated by the provisions of the Energy Law Act of 10th April, 1997³⁷, modified by the previously mentioned act. It is worth emphasising that this fee took over the majority of assumptions which had been developed at an earlier legislative stage for the offshore wind farm tax.

With regard to the concession fee on an offshore wind farm, it is the performance of economic activity in the field of electricity generation in an offshore wind farm, as referred to in the Offshore Wind Farms Act (which contains a definition of an offshore wind farm³⁸). The concession fee itself, which is related to energy production, is not a novelty under the Polish law. An entrepreneur wishing to engage in the activity of generating electricity pays such a concession fee, which is a product of the revenue of the energy company³⁹. This is obtained from the sale of goods or services within the scope of its activity covered by the concession, achieved in the year in which the obligation to pay the fee arose, and with an appropriate coefficient as defined in the regulations issued pursuant to Article 34(6) of the Energy Law (hereinafter: concession fee on energy generation). The Ordinance of the Council of Ministers of 12th October, 2021, on the concession fee is currently in force⁴⁰, according to which the coefficient is 0.0005 (for electricity generation). Therefore, the concession fee is essentially a type of revenue tax with a rate of 0.05% of revenue.

An energy enterprise performing economic activity by producing electric energy in an offshore wind farm pays a concession fee comprising two parts, namely the sum of the previously mentioned concession fee on energy generation and an amount constituting a specific “supplement”.

³⁶ Journal of Laws 2023, item 1385 hereinafter cited as: “the Offshore Wind Farms Act”.

³⁷ Art. 34 of the Act of 10th April, 1997, Energy Law, Journal of Laws of 2022, item 1385, hereinafter cited as “Energy Law”.

³⁸ Art. 3(3) of the Offshore Wind Farms Act.

³⁹ These provisions apply to both entrepreneurs who wish to generate electricity and, *inter alia*, the transmitters.

⁴⁰ Journal of Laws 2021, item 1938.

Herein, this supplement is referred to as the concession fee for an offshore wind farm. It is calculated as a product of the installed electric capacity of the offshore wind farm expressed in megawatts (MW), resulting from the licence for the production of electric energy in this offshore wind farm, and an appropriate coefficient (expressed in PLN) specified in the provisions issued pursuant to Art. 34(6) of the Energy law⁴¹. The law stipulates that this coefficient cannot be greater than 23,000 PLN⁴².

Of course, the question arises as to why this coefficient was set at the maximum level of 23,000 PLN. The explanation can be found in the justification of the draft act on offshore wind farms prepared by the Council of Ministers⁴³.

The amount of the coefficient in question is estimated at 23,000 PLN/MW, taking into account the balancing of the fiscal burden of offshore and onshore wind technologies, as the difference between:

- (a) the average level of property tax for onshore wind farms, amounting to 36,000 PLN/MW per year, less,
- (b) the average fee for the issuance of permits erecting and exploiting artificial islands, installations, and equipment in Polish maritime areas for offshore wind farms under the Act on maritime areas of the Republic of Poland and maritime administration, calculated per one year of operation of the project, amounting to 5,000 PLN/MW/year⁴⁴, and
- c) the average property tax resulting from the application of 2% property tax to the assessed value of the onshore part of the offshore wind farm infrastructure, amounting to 8,000 PLN/MW/year.

According to the Ordinance of the Council of Ministers (2021, cited above) the coefficient is precisely 23,000 PLN. However, it should be noted that from 2021 onwards, due to inflation, it is no longer in line with the concept resulting from the justification of the law which introduced the fee.

Pursuant to Article 34(7) of the Energy Law, an energy enterprise producing electricity in a renewable energy source installation (where

⁴¹ Art. 34(2)(2a) of the Energy Law.

⁴² Art. 34(2a) of the Energy Law. 23,000 PLN is equivalent to 5,152 EUR according to the exchange rate of 20th August, 2023.

⁴³ <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=0282D90367CB9DADC12586370030F731>

⁴⁴ Further to concession fee for the occupation of maritime areas; such a term is not used in the Maritime Areas Act, where a simpler term is used, namely “concession fee”.

the total capacity of the renewable energy source installation does not exceed 5 MW) is exempted from paying a concession fee with regard to the production of energy in that installation.

8. LICENCE FEE FOR THE OCCUPATION OF MARITIME AREAS

The previously described concession fee related to the construction and operation of wind farms is linked to the fee for the permit for occupying the exclusive economic zone for the erection and use of artificial islands, structures, and equipment (as referred to in the Maritime Areas Act). The introduction of these fees is not directly related to the current activity of the legislator concerning the intensification of works on the construction of offshore wind farms, as they have been in force since 2004. However, their regulation has evolved.

In principle, the concession fee for the permit to work within the maritime area is only 1,500 PLN. If the issued permit concerns the occupation of the exclusive economic zone for the erection and use of artificial islands, constructions, and devices, the entity which granted the permit pays an additional fee amounting to 1% of the value of the planned undertaking. This fee is referred to as the concession fee for the occupation of the exclusive economic zone⁴⁵. The value of the planned project is calculated for the purpose of the additional fee, taking into account the market prices for equipment and services necessary for the complete execution of the project (as of the date of submitting the application for the permit)⁴⁶. Moreover, the additional fee is paid gradually:

- 1) 10% of the full amount of the fee within 90 days of the date on which the permit decision becomes binding;
- 2) 30% of the full amount within 30 days from that date,
- 3) 30% of the full amount within 30 days of the day on which the use of artificial islands, structures, and equipment commenced;
- 4) 30% of the full amount after 3 years from the date of the payment referred to in Point 3.

Therefore, it is not strictly a permit fee, since it will not always have to be paid (e.g. in the event of abandonment), even if a permit is granted.

⁴⁵ Art. 27b(1) of the Law on Maritime Areas.

⁴⁶ Art. 27b(1d) of the Law on Maritime Areas.

9. CONCESSION FEE OR TAX – BETWEEN WORDS AND REALITY?

The construction of the concession fees clearly indicates that the legislator treats them as a substitute for the property tax which would be due from the wind farm if the exclusive economic zone was treated as a typical part of the Polish territory (hypothetically). This would constitute a rational and just solution, and would mean that the tax burden on various facilities would be similar in terms of legal construction. Further, there could be no allegations that some form of electricity generation was discriminated against in terms of taxation, which is an important issue.

Different legal situations of entrepreneurs in analogous situations may sometimes be treated as state aid⁴⁷. Of course, it is doubtful that even in the situation of a complete lack of the taxation of offshore wind power plants such an exemption could be considered state aid. However, the very risk of such a view appearing must be a concern for investors. It should be noted here that the UE's Member States can also pursue their tax policy using the stimulative function of the tax. From this perspective, taxing renewable energy more favourably than carbon-intensive energy would be acceptable in principle from the perspective of the state aid rules.

Even if one relied on domestic law, it could be questioned whether the non-taxation of offshore wind farms violated the constitutional principle of equality⁴⁸. However, enforcing respect for the equality of taxation would be difficult while there is a statutory requirement to impose taxes in Poland⁴⁹. Accordingly, it would be impossible to extend the taxation of onshore wind farms to offshore wind farms. Theoretically, it would only be possible to recognise that the levying of tax on onshore wind farms violates the constitutional principle of equality. However, it is difficult to be decisive when formulating a view that the principle of equality has been breached, since the condition for the establishment of a breach of this principle is the recognition that there are no significant differences between onshore and offshore wind farms.

A tax imposed in this way would not be an end to constitutional problems. This is because the concession fee for an offshore wind farm is not a classic fee (within the meaning of the Polish law); it is a tax. In Poland, public fees have a pecuniary character and are paid for some kind

⁴⁷ Arts. 107–109 of the Treaty on the Functioning of the European Union.

⁴⁸ Art. 32 of the Polish Constitution.

⁴⁹ Art. 217 of the Polish Constitution.

of mutual benefit of the state or local government administration; hence, they are equivalent⁵⁰. Neither the concession fee for offshore wind farms nor the concession fee for the occupation of maritime areas (which have been in existence since 2004) has any features of equivalence. Admittedly, owing to the payment of these fees, the entrepreneur may legally carry out investments in Polish maritime areas. However, the amount of the fee refers to the value of these investments and not to the value of the mutual benefit of the public administration body.

Doubts are raised by a statement included in the same justification of the draft of the Offshore Wind Farms, which reads as follows: “The fee is an equivalent benefit, and in this context, it should be noted that the amount of the additional fee within the concession fee for the producers from offshore wind farms is adequate and takes into account the costs incurred by numerous bodies performing tasks related to the development of offshore wind farms in Poland”⁵¹.

Thus, the authors of the draft refer to a hypothetical value of the property tax when determining the amount of the fee for offshore wind farms (as indicated previously). However, in further lines of text they declare that the value of the concession fee corresponds to the costs of public administration. This inconsistency of the authors of the regulations (the discrepancy between the actual content and the declared purpose) provokes the thesis of concealing taxes under the name of “fees” for political reasons⁵².

The Polish legislator is not the only body to avoid using the term tax (probably for political reasons), because introducing new taxes is certainly not an action met with a positive reception in society. As a result, it is commonly indicated in the literature that there are such burdens that are formally referred to as fees, which are actually taxes⁵³.

⁵⁰ See, for example, A. Gomułowicz [in:] A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe [Taxes and Tax Law]*, Warsaw 2008, p. 137, which is a view repeated in virtually every other textbook on tax law.

⁵¹ <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=0282D90367CB9DADC12586370030F731>

⁵² <https://www.money.pl/gospodarka/podatki-w-polsce-balcerowicz-kolejne-daniny-ukrywa-sie-pod-haslem-oplat-6613743569664129v.html>

⁵³ See, for example, D. Antonów, *Pojęcie opłaty w polskim języku prawnym [The Concept of Fee in the Polish Legal Language]*, [in:] W. Miemiec (ed.), *Księga jubileuszowa ku czci profesor Krystyny Sawickiej, Gromadzenie i wydatkowanie środków publicznych. Zagadnienia finansowoprawne*, Wrocław 2017, pp. 487–496.

The question arises whether such “legislative camouflage” has any legal significance. It would appear that there is even a risk of declaring the legal regulation of concession fees unconstitutional. The Polish Constitution sets very strict requirements for tax regulation. According to Article 217 of the Constitution: “The imposition of taxes, other public tributes, the determination of subjects, objects of taxation and tax rates, as well as the principles of granting reliefs and remissions and categories of subjects exempt from taxes shall be made by means of a law”. It follows that in the case of taxes, it is stated explicitly that tax rates must be provided for in the law, while there is no such requirement for fees. Meanwhile, the rate of the concession fee for offshore wind farms will result from a regulation of the Council of Ministers, not from an act adopted by the Parliament. Further, the Energy Law only includes the maximum rate of the coefficient used to calculate the concession fee, which is probably a violation of the Polish Constitution.

This situation would look slightly different if the local character of this tax (called the concession fee) was maintained. In relation to local taxes and fees, Article 168 of the Constitution of the Republic of Poland would be applicable, according to which “Local government units have the right to establish the amount of local taxes and fees within the scope specified in the act”. In practice, the Polish Parliament determines only the maximum rates of local taxes and fees (by the act of the Parliament), and specific rates applicable in a given commune are adopted by the commune council. Thus, if the concession fee was of a local character and was collected by the relevant municipality, the council of this municipality could adopt the rates of this fee, provided it did not exceed the maximum rate set by law. However, the Constitution does not give such freedom to government bodies.

10. CONCLUSION

The introduction of taxation for offshore wind farms will obviously constitute a certain obstacle for investors, similar to any other form of taxation. However, it should be taken into account that the introduction of taxation for offshore wind farms (in the form of the so-called concession fee) has resulted in a comprehensive regulation of the conditions for conducting such investments. To some extent, this balances the financial effects of the introduced fee.

A reasonable assumption was made that all electricity-generation technologies should be treated analogously, and shaping the concession fee to the amount corresponding to the load of an onshore wind farm would be considered a fair solution. The key point is that the concession fee is linked to the amount of property tax paid on an onshore wind farm with similar energy productivity rather than being dependent on the value of the offshore wind farm structure. Typically, building costs for such a farm will be higher than for an onshore farm. If offshore wind farms in Poland were also taxed in relation to their construction costs, then production of the same amount of energy on sea and land would be taxed higher for the offshore wind farms.

The fee under scrutiny is not called a tax (probably for political reasons), even though it is, in fact, a tax. However, the presented regulation should be assessed in a much harsher light from the perspective of the Polish constitutional standards. By assuming that it does not introduce a tax, the legislator did not care about the principles resulting from the Constitution of the Republic of Poland concerning the principles of levying taxes. Meanwhile, from the perspective of the Polish Constitution, it is the features that matter, not the burden. This elicits a moderate risk of recognising the regulation as violating the Polish Constitution, with the possible declaration of unconstitutionality having negative consequences for investors.

The introduced fee constitutes income for the central budget, not for local governments as the property tax (which the fee was supposed to substitute). Thus, while the introduction of the fee is an economically-neutral solution from the perspective of entities investing in offshore wind farms (having been set at an amount corresponding to the property tax paid on onshore farms), Polish municipalities are the losers in discussions on taxing offshore wind farms. Although giving all the revenue from the tax on such farms to Warsaw (or even the coastal municipalities) could be considered unjustified, the introduction of a mechanism distributing the revenue from a fee equivalent to a property tax among all the municipalities in Poland could be considered a possible solution.

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POLSKA OPŁATA KONCESYJNA OD MORSKICH FARM WIATROWYCH – QUASI-PODATEK UKRYTY W PRAWIE ENERGETYCZNYM

Streszczenie. Produkcja energii elektrycznej z wykorzystaniem morskich farm wiatrowych znajduje się w Polsce na etapie przygotowawczym. Ma jednak szansę stać się najdynamiczniej rozwijającym się segmentem energetyki, mając na uwadze ambitne cele w zakresie redukcji emisji CO₂. Rozwój sektora energii odnawialnej w Polsce ma istotny kontekst podatkowy w zakresie podatku od nieruchomości, mając na uwadze, że podatek od projektów infrastrukturalnych stanowi ważne źródło dochodów podatkowych dla gmin. Opodatkowanie farm wiatrowych jest zagadnieniem dobrane rozpoznany, jednakże orzecznictwo wypracowane w tym obszarze nie może pomóc w rozwiązaniu problemu opodatkowania morskich farm wiatrowych. Luka prawna w polskich przepisach regulujących podatek od nieruchomości uniemożliwiła opodatkowanie inwestycji *offshore*. W celu objęcia morskich farm wiatrowych *quasi*-podatkiem polski ustawodawca wprowadził specjalną opłatę koncesyjną, której wysokość jest zbliżona do hipotetycznego podatku od nieruchomości jaki byłby należny od farmy wiatrowej, jeżeli byłaby ona zlokalizowana na lądzie. Celem artykułu jest przedstawienie wątpliwości dotyczących opłaty koncesyjnej od morskich elektrowni wiatrowych z punktu widzenia polskich standardów konstytucyjnych oraz spójności polskiego systemu podatkowego.

Słowa kluczowe: morskie farmy wiatrowe, podatek od nieruchomości, elektrownie wiatrowe, podatki majątkowe, opłata koncesyjna, transformacja energetyczna