

COUNTRY REPORT: POLAND

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Current Regulation of Shale Gas

Poland has become the most developed country within the European Union in terms of shale gas exploration. Apart from shale gas development, quite a lot is currently occurring in the energy sector, which is still heavily dependent on coal.¹ Unfortunately, this development is not being followed by changes in the regulatory framework that would increase environmental standards, as the transposition and proper implementation of almost all climate and energy directives of the European Union have been beset with major problems.² There is no specific regulation that to deal with the issue of hydraulic fracturing. Currently, the general hydrocarbon regime applies to shale gas. The existing legal framework is not inappropriate. The framework for it is *the Geological and Mining Law*.³ It covers the exploration and extraction phase for all hydrocarbons as well as other fossil fuels.⁴ It is therefore naturally relevant for exploration of shale gas, as well as to the derivation of hydrocarbons from any other unconventional sources.

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¹ For a general overview of Polish power sector see: E. Bayer *Report on the Polish power system. Version 1.0. Country profile*, Berlin 2014; available under: http://www.agora-energiawende.de/fileadmin/downloads/publikationen/CountryProfiles/Agora_CountryProfile_Poland_022014_web.pdf

² See M. Stoczkiewicz (edit.) *Black Paper. Implementation of EU Climate and Energy Law in Poland*, Warsaw 2013; the publication is available under: <http://www.clientearth.org/reports/061113-climate-and-energy-black-paper.pdf>

³ Geological and Mining Law from the 9th June 2011, published in the Journal of Laws of the Republic of Poland, No. 163, position 981 with further changes.

⁴ For energy purposes it's mostly coal, as Poland is appropriately 2nd producer in the EU of hard coal and 4th of lignite. See *Energy 2013. Central Statistical Office*, Warsaw 2013, p. 4; available under: http://stat.gov.pl/cps/rde/xbcr/gus/ENERGIA_2013.pdf

This brings us to the question of the quality of the implementation of environmental directives. This will demonstrate that there is a great need to take a modified legislative approach in the matter of shale gas regulation, most pertinently to resolve flaws in the national regulatory frameworks implementing EU acts.

New Shale Gas Regulation

Development of shale gas in Poland comes along with changes in national legislative framework. Those changes – according to the Government – shall make exploration and extraction of unconventional hydrocarbons much easier for investors. The case of Poland may be seen as peculiar, considering that legislative actions at the EU level are aimed at additional regulation, and the ones undertaken in Poland aim at deregulation. The other factor that lies at the root of the legislative changes in Poland is the lack of full implementation of directive 94/22/EC on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons.⁵

Work on a national regulation to introduce a new regulatory framework, more favourable for investors, started in 2012. Firstly, guidelines on the extraction of hydrocarbons, including those from conventional sources were adopted on the 16th of 2012 by the Council of Ministers.⁶ In February 2013, the first version of the Bill was presented,⁷ and shortly after this, sent out for public consultation. It then transpired that the Bill would just amend existing regulations. After a long public debate, with lots of stakeholders involved, including ministries representing different interests, a final version of the Bill was sent to the Parliament on the 23rd of April 2014. It was adopted on the 11th of July 2014.⁸

⁵ Published in: OJ L 164, 30/06/1994, p. 3-8. Commission took an action against Poland for a failed transposition which ended up with a judgement of the European Court of Justice from the 27th June 2013 (C-569/10) stating that tenders were not free of all discrimination as required by the directive 94/22/EC. Judgment is available under: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0569:EN:HTML>. Naturally, vital question concerns impacts of this judgement, but it does not lead to revocation of granted permissions.

⁶ Available under: http://www.mos.gov.pl/g2/big/2012_10/a63b0d95d3420a6e1ece57ca65285170.pdf

⁷ Version of the Bill from the 15th February 2013 is available under:

⁸ Published in the Journal of Laws of the Republic of Poland from 2014, position 1133, available under: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140001133>

The scope of this Bill is much broader than just shale gas (or more broadly hydrocarbons from unconventional sources), as it covers exploration of hydrocarbons of all types, i.e. inter alia: heavy oil, oil shale, shale oil, shale gas, coal bed methane, methane hydrates. This is interesting in terms of fostering public acceptance of a specific energy source. Because of the high dependency of the natural gas market on imports from only one direction (Russia), there has been a very high public acceptance for any activities that could change this geopolitical situation. Apart from this, a gold-rush vision has also been created in public debate.⁹ But the legislative changes covered all hydrocarbons, so this will also cover gas from conventional sources, and oil from both conventional and unconventional sources.

A key incentive for investors is the lack of an Environmental Impact Assessment (EIA) requirement for exploratory drillings.¹⁰ An EIA will only be obligatory for extraction drillings, no matter what volume of extraction is expected from a particular well. Such a regulation does not make much sense, as quite often prospective exploratory drillings are being converted into extraction drillings. Thus, any environmental impacts have already occurred. Environmental impacts are also caused by hydraulic fracturing, as this too is quite often being carried out at the exploratory phase. Because of the nature of unconventional sources, that are much more widespread than conventional sources, there are also more extraction wells. After one successful exploratory drilling exercise, in locations not far from the exploratory drilling, more extraction drillings will take place. If intrusion into the environment happens within exploratory drilling, on almost the same scale as by extraction wells, then a later obligatory EIA is not able to change much – e.g. by a negative result of an EIA - as the exploratory drilling which has already been conducted and cannot be revoked. Another controversial element around changes in EIA concerns the scope of an EIA for shale gas drillings. It is only necessary to analyze the area within a 500m radius from the drilling pad. Not only is this requirement unclear, because it has not been specified whether the area should be counted on the basis of vertical drillings or horizontal drillings (that might go few kilometers away from the drilling pad); but also, when it comes to effectiveness of such a

⁹ One of the examples is plan of creating a state-owned fund that receives tax incomes from new shale gas taxes (*Międzypokoleniowy Fundusz Węglowodorowy*) – the model regulation for this was The Government Pension Fund of Norway. Although no taxes have been collected yet, discussions on how to spend those incomes are highly developed.

¹⁰ This is coherent with the EIA directive as Art. 4 section 1 refers to Annex I and Annex II of the directive to decide on whether such an investment shall undergo an obligatory EIA or only facilitative. EIA for hydrocarbons extraction is only then obligatory when daily extraction is to exceed 500.000m³ of natural gas or 500 tones of crude oil.

study, it is highly questionable whether such a low radius of impact assessment as planned in the refreshed national legislation allows for proper consideration of the environmental impacts of the operation.

Another example of a decrease in environmental standards include changes to participatory rights within EIA procedures, changes which have already gained the nickname of 'Paragraph 44'¹¹ amongst pressure groups. These changes to the national regulations concerning all EIA proceedings limit the right to participate in such proceedings for environmental organizations. For proceedings that require public participation, only those entities that have existed for a minimum of 12 months before the beginning of a procedure are entitled to participate. This measure to protect big infrastructure projects is a failed one, as it disables local communities in their participatory rights, foreseen inter alia by Art. 2 section 5, Art. 6 section 4 and Art. 6 section 7 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as the 'Aarhus Convention'. In this regard, the national regulatory framework is not consistent with the Convention. Local communities are not always organized in forms of ecological organizations, and quite often do tend to form such groups only as a reaction to a specific project or decision of political stakeholders. Only then also will other pressure groups come on board – such a national regulation therefore undermines also the development of civil society. From a constitutional perspective it also represents an unequal treatment, as there is no justification for distinguishing between environmental organizations older than 12 months in terms of differentiating their legal status.

There are also some positive developments however within this refreshed regulatory framework. Most important, it is now obligatory to disclose which chemicals are used in fracking fluid. In addition, the new framework not only concerns providing information to

¹¹ This nickname stems from the fact that it is based on the following paradox: the Government wanted to prevent infrastructural projects being blocked by eg. competitors of the investor, but in the end created a provision that only undercuts genuine groups representing local society. It thus undermines civil society as a whole. Regarding policy issues see: M. Olszewski *Paragraf 44: knebel zamiast debaty*, "Gazeta Wyborcza" from 19th April 2013, available under: http://wyborcza.pl/magazyn/1,132059,13773491,Paragraf_44__knebel_zamiast_debaty.html?order=najnowsze; regarding legal issues see: B. Matuszewski, R. Rybski *Lokalni ekolodzy zostana wyrzuceni za burtę*, "Rzeczpospolita" from 5th April 2013, available under: <http://prawo.rp.pl/artukul/757643,996706-Ograniczenia-dla-nowych-organizacji-ekologicznych-sa-niekonstytucyjnego.html>

mining authorities, but new statutory regulation will clearly state that it would not withhold information protected by trade secrets of a drilling company. This means that anybody exercising his/her right to public information will be able to gain such information. Another element that vastly increases transparency is an obligation for operators to launch Internet websites with a map, and all relevant documents, for a particular concession. Operators will be also obliged to operate with insurance coverage against civil liability. This however does not cover environmental damages. Finally, a further positive development includes the deprivation of licenses for infringement of license terms, eg. by infringement of provisions securing environmental protection.