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Data: 22/11/2026 12:20:19

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Legal Aspects of Taxation of Offshore Wind Farms in Poland

Prawne aspekty opodatkowania morskich farm wiatrowych w Polsce

ABSTRACT

The provisions of the Act on promoting electricity generation in offshore wind farms have been in force since 18 February 2021. They are intended to simplify administrative procedures for obtaining permits and approvals for the implementation of offshore projects and to contribute to the fulfillment of Poland's international obligations to maintain and increase the mandatory share of renewable energy sources. The Act also amended the Energy Law, which introduced provisions regulating the new license fee. Calculation and payment of this levy to the Energy Regulatory Office is mandatory for companies in the energy sector that conduct business operations involving production of electricity in offshore wind farms. In the author's opinion, these entities are payers of a new tax, paradoxically referred to as fee, which, contrary to the original assumptions, was not introduced due to extra-legal factors. The article analyzes the legal regulations that introduce taxation of offshore wind farms in Poland against the background of controversial normative solutions concerning the property tax imposed on onshore wind power plants.

Keywords: offshore wind farm; tax; wind power plant; license fee

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Data: 22/11/2026 12:20:19

INTRODUCTION

The increased demand for energy in the globalizing economy, as well as the need to diversify its sources, have given rise to a search for new, alternative sources of clean energy. In particular, a great potential has been found in the development of wind farms. Until recently, the development of these facilities has only taken place on land, i.e. in the territories of individual states. This has determined the method of taxation of the energy infrastructure that constitutes a wind farm. In Poland, the beneficiaries of the property tax paid on such infrastructure are the communes and municipalities in whose territory the wind farms are located.

For some time, due to stable wind conditions, the construction of offshore wind farms in the exclusive economic zones of individual countries has also been promoted. This is certainly facilitated by the policies of these countries, which support the development of green energy sources, e.g. by issuing permits for the construction of artificial islands for offshore wind farms, simplifying administrative procedures, and applying preferential taxation. This trend can be seen, e.g., in the UK – the leader in offshore wind power in terms of the total installed capacity, as well as in Denmark, Germany, France, and China – the future new leader in wind power. This development is clearly becoming irreversible due to the anticipated post-pandemic economic recovery.[1]

The above-mentioned factors have a significant impact on the interest in the development of offshore wind energy projects, which is growing also in Poland. What must not be ignored is the international commitments undertaken by Poland, which consist in maintaining after 2020 the obligatory share of renewable energy sources (RES) in the gross final energy consumption at the level of not less than 15%[2] and, as a result, contributing to the achievement of the EU's common RES target (32% by 2030) and the targets indicated in the National Energy and Climate Plan for 2021–2030.[3] In that document, which has been notified to the European Commission, Poland declared its intent to achieve by 2030 a 21% share of RES

[1] As estimated by JPMorgan, vaccines and new medicines for COVID-19 will contribute to the containment of the pandemic in 2022, resulting in a rebound of the global economy and a return to normal economic and market conditions, as well as an increase in consumer demand, which has been suppressed during the COVID-19 pandemic. See Business Insider, *Bank JPMorgan wieszczy globalne ożywienie gospodarcze*, 8.12.2021, https://businessinsider.com.pl/gospodarka/jpmorgan-wieszczy-globalne-ozywienie-gospodarcze/m2xzb6y (access: 8.7.2023).

[2] Article 3 (4) of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328/82, 21.12.2018).

[3] Ministerstwo Aktywów Państwowych, Krajowy plan na rzecz energii i klimatu na lata 2021–2030 przekazany do KE, 30.12.2019, https://www.gov.pl/web/aktywa-panstwowe/krajowy-plan-na-rzecz-energii-i-klimatu-na-lata-2021-2030-przekazany-do-ke (access: 8.7.2023).

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Data: 22/11/2026 12:20:19

in its gross final energy consumption, as well as to increase the share of RES to approximately 27% in the net electricity production.

The development of offshore wind electricity production is crucial for the fulfillment of Poland's international commitments in the area of RES in the long term and for the achievement of the objectives set out in the strategic document. It is therefore necessary to create a legal framework to stimulate the development of this sector and to introduce dedicated support instruments. As the experience of other countries shows, in order to mitigate the costly long-term investment risk, the mechanism for the policy of state support for the offshore wind energy sector requires at the same time an improvement in the administrative procedures for issuing the decisions necessary for the performance of offshore projects, as well as adoption of principles of fair and equal taxation that are neutral for the choice of RES technologies.

The Act of 17 December 2020 on promoting electricity generation in offshore wind farms[4] is the normative act that introduces legal support instruments. This APEGOWF came into force on 18 February 2021 and filled the hitherto existing gap in the Polish tax system with respect to the taxation of offshore wind farms by introducing the so-called license fee, the amount of which depends on the installed capacity of the offshore wind turbines. Importantly, the regulations that govern taxation of this infrastructure were placed in the "non-tax" Energy Law,[5] which was amended by the APEGOWF.

The aim of the paper is to analyze and evaluate the legal solutions that introduce taxation of offshore wind farms in Poland. For the purpose of this paper, the following research hypotheses were adopted:

1. The national laws that govern taxation of wind power plants in Poland are useless and symmetrically impossible to apply in order to establish a legal mechanism for taxation of offshore wind farms. The reason for this extends beyond the volatility of the law and the lack of stability of the case law. The Polish Government's decision to introduce a new tax on offshore wind farms, whose beneficiaries cannot be communes and municipalities, made it necessary to define the permanent features of the new public levy and its calculation elements.
2. The new legal mechanism for taxing offshore wind farms that has been introduced in Poland favors the implementation of the principle of equity and universality (equality) of taxation.
3. The license fee, for incomprehensible reasons called a fee by the legislator, is a regular tax with all the legal consequences thereof, although the basis for its introduction was the provisions of a non-tax law.

[4] Journal of Laws 2021, item 234, hereinafter: APEGOWF.

[5] Act of 10 April 1997 – Energy Law (consolidated text, Journal of Laws 2020, item 833, as amended), hereinafter: ELA.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:20:19

LEGAL ASPECTS OF TAXATION OF ONSHORE WIND FARM – IMPLICATIONS FOR TAXATION OF OFFSHORE WIND FARM

The provisions of Article 23 (1a) of the Act of 21 March 1991 on maritime areas of the Republic of Poland and maritime administration,[6] amended by Article 92 (1) APEGOWF, prohibits *ex lege* the erection and use in the internal waters and the territorial sea of offshore wind farms referred to in the APEGOWF. The *ratio legis* of this solution was the need for rational and effective management of limited resources of the maritime areas of the Republic of Poland, for counteracting the fragmentation of areas intended for the construction and operation of offshore wind farms, and for prevention of unfair market practices.[7] New offshore wind farms can therefore be located practically only in the Polish exclusive economic zone. At the same time, this is the furthest area of the Baltic Sea where national tax laws apply to such complexes of facilities.[8]

The property nature of assets such as offshore wind power plants supports the claim that systematically the closest legal act that covers taxation of this type of facilities is the Act of 12 January 1991 on local taxes and fees.[9] This is also confirmed by the fact that similar onshore facilities that use wind to generate electricity are already taxable under that Act. Pursuant to Article 2 (1) (3) ALTF, structures or parts thereof related to the conduct of business operations are subject to real estate tax. According to Article 1a (1) (2) ALTF, a structure is "a building structure, as defined by the provisions of the construction law, which is not a building or a streetscaping object, or a construction facility, as defined by the provisions of the construction law, connected to a building structure, which ensures the possibility of using the building structure in accordance with its purpose". In view of the reference in the tax law to the meaning of the terms "building structure" and "construction facility" set forth in unspecified "provisions of the construction law", it is of key importance to determine whether wind power plants are taxable structures and, if so, what elements constitute the object of taxation. The controversy seems to be all the greater in view of the fact that in the act that is systemically appropriate for defining these terms, namely the Construction Law,[10] the term "structure" is additionally defined for the purpose of that Act in its Article 3 (3) by way of an enumerative indication of examples of structures.

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[6] Journal of Laws 2020, item 2135.

[7] Sejm RP, Rządowy projekt ustawy o promowaniu wytwarzania energii elektrycznej w morskich farmach wiatrowych, Druk nr 809, https://sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=809 (access: 8.7.2023).

[8] M. Ruta, *Podatek od morskich farm wiatrowych – proponowany model opodatkowania inwestycji offshore*, "Przegląd Podatkowy" 2020, no. 6, p. 55.

[9] Consolidated text, Journal of Laws 2019, item 1170, as amended, hereinafter: ALTF.

[10] Act of 7 July 1994 – Construction Law (consolidated text, Journal of Laws 2021, item 2351), hereinafter: CLA.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:20:19

In the case of onshore wind farms, there is generally no doubt that they are subject to a property tax. However, there is a problem with identifying the components of these facilities whose value should be used when declaring the tax basis and calculating the tax due to communes or municipalities. The doctrine of tax law presents the view that a wind power plant is a building structure or, more precisely, a structure that constitutes a so-called technical and usable whole. Consequently, all of its components, whether or not built, should be subject to property tax.[11] This position should be approved of, despite the fact that it is not always accepted in the verdicts of administrative courts, which indicate the need for taxing only the built components of wind power plants.[12]

Adoption of a uniform and stable mechanism of taxation of onshore wind farms is undoubtedly hindered by the volatility of the law and the indecisiveness of the legislator. However, its interpretation may be facilitated by the interpretative guidelines contained in the judgments of the Constitutional Tribunal, which are also referred to by the Supreme Administrative Court. Thus, when analyzing the nature of the definition of the term "structure", in the grounds for its judgment of 13 September 2011,[13] the Constitutional Tribunal stated that this definition should be regarded as partial in scope. This is because it formulates two conditions: (1) the sufficient condition for being a structure, according to which structures are all the objects indicated enumeratively in its content, and (2) the necessary condition for being a structure, according to which structures are not building structures classified as buildings or streetscaping objects. Therefore, the definition of a structure provided in Article 3 (3) CLA does not determine the status of building structures other than those indicated expressly in the wording of the sufficient and necessary conditions and using it to classify some unlisted building structure as a structure would require recourse to the rules of functional interpretation. In the Tribunal's opinion, classification of certain building structures as structures, apart from the definition provided in Article 3 (3) CLA, may also be determined by other provisions of that Act and additionally by the content of other laws (directional acts). From the point of view of observance of the constitutional standards reinforced by Articles 84 and 217 of the Polish Constitution,[14] the Tribunal found it inadmissible to consider as subject to property tax structures within the meaning of Article 3 (3)

[11] L. Etel, M. Popławski, *Czy elektrownie wiatrowe podlegają opodatkowaniu podatkiem od nieruchomości?*, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2009, no. 6, p. 17 ff.

[12] B. Pahl, *Morskie farmy wiatrowe zlokalizowane w wyłącznej strefie ekonomicznej a podatek od nieruchomości*, "Finanse Komunalne" 2013, no. 3, p. 40 ff.

[13] Judgment of the Constitutional Tribunal of 13 September 2011, P 33/09, OTK-A 2011, no. 7, item 71.

[14] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.8.2023).

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Data: 22/11/2026 12:20:19

CLA that do not belong to the category of building structures explicitly mentioned in that provision or in the remaining provisions of that Act, or in the appendix thereto, which are only similar to those building structures.

Bearing the above in mind, it should be noted that the provision of Article 3 (3) CLA, in the wording in force since 1 January 2018, expressly considers built parts of technical facilities, including wind power plants, as structures. By amending the Construction Law retroactively on 7 June 2018, the legislator restored the wording of the provision in this regard as it existed prior to 15 July 2016.[15] On the other hand, as of 18 February 2021, the catalogue of structures provided in Article 3 (3) CLA by virtue of Article 93 APEGOWF was supplemented with the words "offshore wind turbines", right after the words "wind power plants". As part of the *ratio legis*, it was therefore found that it was necessary to supplement the definition of a structure by adding an offshore wind turbine.[16] Consequently, from the point of view of tax-law qualification, built parts of technical facilities, of both wind power plants and offshore wind turbines, could be regarded as structures for the purpose of property tax. This would support the adoption of identical taxation rules for them and would only require their extension to the exclusive economic zone.

The above findings are incorrect for several reasons. Most importantly, in the light of the indications given by the Constitutional Tribunal in the aforementioned judgment, these building structures cannot be considered similar and inference based on an analogy cannot be used for taxation purposes. It should also be noted that by virtue of the Act of 20 May 2016 on investments in wind power plants,[17] Article 3 (3) CLA was amended by deleting wind power plants from the catalogue of technical facilities, of which structures are only the built parts. Wind turbines are also listed as structures in box XXIX of the Appendix to the Construction Law. However, in its Article 2 (1), the amending act introduces a legal definition of a wind power plant (which had previously been absent) and Article 17 AIWPP indicates that "from the date of entry into force of the Act until 31 December 2016, the property tax on wind power plants shall be determined and collected in accordance with the provisions in force prior to the date of entry of the Act into force".

In the doctrine of tax law, the intention of the legislator was accepted either as a strong sign of a change in the rules of taxation of wind power plants from the beginning of 2017[18] or, paradoxically, as a preservation of the existing rules of their

[15] The catalogue of structures contained in Article 3 (3) CLA was explicitly supplemented by "built parts of technical facilities (boilers, industrial furnaces, nuclear power plants, wind power plants, and other facilities)".

[16] Sejm RP, *op. cit*.

[17] Consolidated text, Journal of Laws 2021, item 724, hereinafter: AIWPP.

[18] Cf. L. Etel, *Co ma kocioł do wiatraka? Opodatkowanie elektrowni wiatrowych w 2017 r.*, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2017, no. 1, p. 13 ff.; R. Dowgier, *Nowe zasady opodatkowania elektrowni wiatrowych*, "Przegląd Podatków Lokalnych i Finansów Samorzą-

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Data: 22/11/2026 12:20:19

taxation.[19] An undeniably important argument is the existence of a transitional provision – the aforementioned Article 17 AIWPP, which cannot be treated as redundant or lacking in normative content, as well as the legal definition of a wind power plant, the importance of which cannot be ignored. Pursuant to Article 2 (1) AIWPP (in its original form), a wind power plant was a structure, as defined in the Construction Law, consisting of at least a foundation, a tower, and technical components, with a capacity greater than the capacity of a micro-installation within the meaning of Article 2 (19) of the Act of 20 February 2015 on renewable energy sources.[20]

Ultimately, the issue of whether as of 1 January 2017 there was a change in the taxation of wind farms had to be decided by a larger panel of seven judges of the Supreme Administrative Court (the SAC), which referred to the guidelines contained in the Constitutional Tribunal's judgment no. P 33/09. In the judgment of 22 October 2018,[21] the SAC confirmed the change in the principles of taxation of wind power plants from the beginning of 2017, indicating that Article 2 (1) AIWPP supplements the catalogue of structures specified in Article 3 (3) CLA. Thus, the SAC shared the Constitutional Tribunal's view that the status of individual building structures and facilities can also be determined by other statute-level regulations that supplement the Construction Law. Consequently, it expressed the position that since the definition of a wind power plant provided in Article 2 (1) AIWPP was adopted for purposes associated with "the provisions of the construction law", this circumstance cannot be disregarded when interpreting Article 1a (1) (2) ALTF.

The judgment of the panel of seven judges of the SAC, which was in favor of taxing the whole wind power plant, was issued when a different legal state was already in force. The legislator changed the principles of taxation again in mid-2018 – retrospectively, i.e. from 1 January of that year. Not only Article 3 (3) CLA was amended, but also box XXIX of the Appendix to the CLA, in which only built parts of wind power plants were identified as structures. This fundamental retroactive modification of the taxation principles during the year proved to be beneficial for the taxpayers, but it was difficult to accept for the communes and municipalities whose budgets were based on the revenues from the property tax and which should

dowych" 2016, no. 9, p. 6 ff.; idem, *Podstawa opodatkowania elektrowni wiatrowych w kontekście nowych zasad opodatkowania*, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2017, no. 3, p. 6 ff.; P. Pahl, *Opodatkowanie elektrowni wiatrowych od 1 stycznia 2017 r. Glosa aprobująca do wyroku WSA w Bydgoszczy z dnia 21 lutego 2017 r. (I SA/Bd 866/16)*, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2017, no. 8, p. 33 ff.

[19] D. Malinowski, A. Małecka, *Czy od 1 stycznia 2017 r. zwiększy się podatek od farm wiatrowych?*, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2017, no. 1, pp. 6 ff.; W. Morawski, *Zmiany regulacji w podatku od nieruchomości w 2016 r. – drobne remonty w skansenie*, "Przegląd Podatkowy" 2016, no. 11, p. 19 ff.

[20] Journal of Laws 2015, item 478.

[21] II FSK 2983/17, CBOSA.

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Data: 22/11/2026 12:20:19

be compensated for this loss. The violation of the constitutional principle that prohibits retroactivity of law is not without significance.

The instability of the legislator in terms of presenting a model of taxation of onshore wind farms that is understandable for the taxpayers and the communes and municipalities, and legislatively stable (compliant with the principle of legal certainty) is not without significance for the method of taxation of offshore wind farms. However, this is not a decisive factor. Due to the fact that Article 3 (3) and (4) APEGOWF provides autonomous definitions of the terms "offshore wind farm" and "offshore wind turbine", it would be crucial to clearly determine which components of an offshore wind farm should be subject to property tax. Another basic issue is which tax authorities are competent to impose the property tax on the taxable components located in the exclusive economic zone, as well as which commune or municipal council should adopt a resolution setting the property tax rates for structures located in that zone.[22]

An analysis of the above problems leads to the conclusion that the extension and application of the regulations governing the property tax contained in the ALTF to the exclusive economic zone is inadmissible. Offshore wind farms located in that zone cannot be subject to property tax because its area does not constitute the territory of Poland. Due to the legal loophole that had existed in this respect for many years, the exclusive economic zone is outside of the jurisdiction of any Polish commune or municipality. Therefore, no commune or municipality may adopt a relevant resolution on property tax rates, on the basis of which it would be possible to calculate the amount of tax due for offshore wind farms. Adoption of such resolutions is a manifestation of the taxation power of communes and municipalities. In principle, they are acts of local law and are binding only in the territory of the body that has adopted them. It is therefore not possible to extend the range of application of an act of local law that is a part of local tax law outside the territory where the body that adopted it exercises its jurisdiction. The lack of a tax authority of competent jurisdiction for the relevant location and the impossibility to adopt a property tax rate are undoubtedly the factors that have resulted in abandonment of the solutions contained in the ALTF in favor of the introduction of a completely new tax on offshore wind farms, the beneficiary of which will be the state budget.

[22] These problems were aptly pointed out by B. Pahl (*Morskie farmy…*, p. 41 ff.).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:20:19

IN SEARCH OF A MODEL FOR TAXING OFFSHORE WIND FARMS – A NEW TAX OR A LICENSE FEE?

The concept of imposing a completely new tax on offshore wind farms that is not a local tax and does not involve the need for commune or municipal councils to adopt the relevant rates was preferred by the government from the beginning.[23] An analysis of the provisions of Article 94 (4) APEGOWF concerning taxation of offshore wind farms should, however, be preceded by an indication of the methods used to solve this problem in tax systems of other EU countries. Let us take a look at what tax system solutions have been introduced in the EU countries with advanced offshore energy.

It should be noted that in most such countries no property tax or similar levy has been imposed on offshore wind farms. There is no such tax in Germany, the Netherlands, or Denmark. In the UK, no such tax applies outside the 12 nautical mile zone. In the Netherlands, like in the United Kingdom, the property tax on offshore wind farms is to the export cable and the onshore substations only. Communes and municipalities are entitled to impose a property tax only on the components of these farms that are located in their territory, including cables and transformer stations that form a connection to the land. Transformer stations and cables are generally considered real property. Wind farms located outside the 12-mile zone are not taxable.

In contrast, a special tax on offshore wind turbines has been introduced into the French tax system. It is paid annually at the rate of EUR16,301 per MW of installed capacity, similarly to the annual fee for the occupation of public marine areas charged at the rate of EUR1,000 per unit and EUR0.5 per meter of connection plus EUR4,000 per MW of installed capacity. The special tax on offshore turbines thus translates into higher subsidies for offshore projects in France compared to Germany and the Netherlands.[24]

The introduction of a new tax on offshore wind farms in Poland is conceptually similar to the French regulations. It was based on the objective of equal fiscal treatment of all electricity generation technologies, including RES. Uniformity of the tax burden on all RES projects in the country, regardless of the main energy carrier and the place of generation, has been adopted as a principle. The rationale for imposing a separate tax on offshore wind energy generating companies was to ensure a comparable tax burden on all RES technologies. This mechanism should be general in nature, independent of the period of support, and based on equal treatment of entities, which

[23] A. Kałążny, W. Morawski, *Taxation of Assets Used to Generate Energy – In the Context of the Transformation of the Polish Energy Sector from Coal Energy to Low-Emission Energy*, "Energies" 2021, vol. 14(15).

[24] See Rządowe Centrum Legislacyjne, Projekt ustawy o promowaniu wytwarzania energii elektrycznej w morskich farmach wiatrowych, nr UD34, 3.12.2020, https://legislacja.rcl.gov.pl/projekt/12340952/katalog/12743891#12743891 (access: 8.7.2023), p. 16.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:20:19

should be differentiated solely on the basis of the characteristics of the individual technologies implemented.[25]

It should first be emphasized that the Minister of Finance was not the author of the draft Act on promoting electricity generation in offshore wind farms (including the provisions on their taxation). The original version of the draft authored by the Minister of State Assets on 15 September 2020 provided for the introduction of a new tax on offshore wind farms (Chapter 10 Articles 82–89), with all its structural components. Thus, it was assumed that the object of this tax was to be the performance of business operations consisting in generation of electricity in an offshore wind farm in the exclusive economic zone. Issuance of the license for the production of electric energy in an offshore wind farm by the President of the Energy Regulatory Office (the ERO) to a natural person, a legal entity, or e.g. a partner in a civil partnership (or to another organizational unit without legal personality) was to mean that these persons obtained the status of a taxpayer. At the same time, the act stipulates that the new tax constitutes the revenue of the State budget and is a property tax linked to the place of business. Such a stipulation may be regarded as advantageous because it does not lead to possible interpretation problems arising under the provisions of the ALTF, which refer to the provisions of the Construction Law with respect to the determination of the term "structure".

The tax basis for offshore wind farms was defined by the authors of the draft law in a revolutionary manner, in comparison to the taxation of onshore wind farms. It is therefore not the initial value of the structure adopted for depreciation purposes. The basis for taxation with the tax on offshore wind farms is the installed capacity of the offshore wind farm specified in the license granted. Installed capacity of an offshore wind farm is defined in Article 3 (2) of the draft Act on promoting electricity generation in offshore wind farms as "the sum of the rated capacities of the offshore wind turbines constituting the offshore wind farm, as determined by the manufacturer, not higher than the connection capacity".

As a result, the amount of the levy depends on the capacity of feeding energy into the grid, which was predetermined by the turbine manufacturer. The intent of the authors of the draft was therefore to collect the tax in an amount independent of the actual energy produced by the turbine, which depends, among other things, on the wind conditions. An important issue that has been pointed out in the literature is the determination of the correct power rating already at the stage of the taxpayer's application for the license, since once the decision to issue the license becomes final, changing the value of the tax basis would be formally impossible. It would be unusual if the existence of a tax basis was to be conditioned on the service of an individual administrative act by a non-tax authority (the President of the ERO), and the taxpayer would be deprived of the ability to challenge the tax basis before

[25] Sejm RP, *op. cit*.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:20:19

a tax authority – bound by the stipulations in that license.[26] An equally important problem was pointed out by the Legislative Council, which noted that the date of receipt of the license would affect the occurrence of tax liability. This is because it would arise (in accordance with Article 86 (1) of the draft Act on promoting electricity generation in offshore wind farms) on the first day of the month following the month in which the taxpayer was granted the license for production electricity in an offshore wind farm. The mere issuance of a license, however, does not necessarily *a priori* trigger the actual operation of the business one month after receipt of the license. The tax obligation was therefore not linked to the time of the first supply of electricity to the grid – a time to which the project attached importance when defining the dates of commencement of the operation of offshore wind farms.[27]

A tax rate is flat and equal to PLN23,000 per MW. This means that the amount of tax for a calendar year would be the product of that rate and the installed electrical capacity of the offshore wind farm expressed in MW according to the license. The method and terms of payment were generally to be based on the well-known and widely used technique of self-calculation of tax.[28] A taxpayer holding a license for generation of electricity in an offshore wind farm, regardless of its legal status, would be required to:

- submit a tax return in accordance with a prescribed form by 31 March for the previous fiscal year to the head of the tax office competent for the address of the taxpayer's registered office (legal persons or organizational units without legal personality) or the taxpayer's place of residence (natural persons),[29]
- calculate the amount of tax due,
- make payments of the tax calculated in the tax return – without a prior call – to the account of the appropriate tax authority, in four proportional installments, for the duration of the tax obligation, within statutory deadlines.

The authors of the draft act reasonably assumed at this stage that in taxes involving self-calculation tax authorities should enter into the process of performance of the obligations after the passive actors have been active in the process.[30] Shifting the burden of calculation, documentation, and payment of the correct amount of tax to the taxpayers who have the best knowledge of the tax basis and are therefore in

[26] M. Ruta, *op. cit.*, p. 57 ff.

[27] Rada Legislacyjna, Opinia z 21 lutego 2020 r. o projekcie ustawy o promowaniu wytwarzania energii elektrycznej w morskich farmach wiatrowych, RL-033-7/20, https://www.gov.pl/web/radalegislacyjna/opinia-z-21-lutego-2020-r-o-projekcie-ustawy-o-promowaniu-wytwarzania-energii-elektrycznej-w-morskich-farmach-wiatrowych (access: 8.7.2023).

[28] See more R. Mastalski, *Stosowanie prawa podatkowego*, Warszawa 2008, p. 39 ff.

[29] The sample form of this tax return would be specified by the Minister of Finance in a regulation.

[30] P. Pietrasz, J. Siemieniako, *Znaczenie oświadczeń podatnika w rozstrzyganiu spraw podatkowych*, https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/7517/1/P_Pietrasz_J_Siemieniako_Znaczenie_oswiadczen_podanika_w_rozstrzyganiu_spraw_podatkowych.pdf (access: 8.7.2023).

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Data: 22/11/2026 12:20:19

the position to most correctly declare the tax and pay it in the required amount was undoubtedly a deliberate act by the legislator.[31]

A completely different draft was submitted for deliberation to the Parliament by the Minister of Climate, which provides for modified principles of taxation of offshore wind farms compared to those presented above. The APEGOWF that was finally passed on 17 December 2020 introduced, instead of a tax on offshore wind farms, the so-called license fee paid by the energy company that conducts business operations consisting in electricity generation in an offshore wind farm. Importantly, the APEGOWF does not include provisions governing the calculation and payment of the new license fee. Instead, they were included in the Energy Law amended by Article 94 APEGOWF, more specifically in Article 34 ELA, which partially regulated the payment of license fees by other energy companies holding relevant licenses. This does not alter the fact that the provisions regulating the principles of taxation, for the introduction of which a higher legislative standard is required, have been introduced by a non-tax law, which formally should not take place, but has almost become the rule.

Pursuant to Article 34 (2a) ELA, an energy company that conducts business operations that involve production of electricity in an offshore wind farm, as referred to in the APEGOWF, shall pay a license fee. It follows from that provision that the license fee should be calculated by that company and paid without a prior call. Regarding its calculation, it is provided that the license fee is the sum of:

- the amount calculated pursuant to Article 34 (2) ELA, i.e. the product of the energy company's revenue generated from the sale of goods or services as part of its business operations covered by the license, obtained in the year when the obligation to pay the fee arose, and the coefficient set forth in the Regulation of the Council of Ministers (i.e. 0.0005), but not less than PLN1,000 and more than PLN2,500,000, and
- the amount being the product of the installed electric capacity of the offshore wind farm, within the meaning of Article 3 (2) APEGOWF, expressed in MW, specified in the license for electricity generation in this offshore wind farm, and the coefficient equal to the amount of PLN23,000.[32]

Thus, the license fee for offshore wind farms consists of two components and its final amount depends on the revenues of the company from its operations, the installed electric capacity of the offshore wind farm, and the coefficients specified as lump sums. The method of calculation of the second component of the license fee is identical to that proposed in the original draft law on taxation of offshore wind farms. In the *ratio legis*, it was described as an additional fee on offshore wind

[31] See more K. Teszner, *Realizacja zobowiązania podatkowego w drodze samoobliczenia podatku*, [in:] *System Prawa Finansowego*, vol. 3: *Prawo daninowe*, ed. L. Etel, Warszawa 2010, p. 659.

[32] The coefficient in this amount was specified in Annex 2 Part B of the Regulation of the Council of Ministers of 12 October 2021 on the license fee (Journal of Laws 2021, item 1938).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:20:19

farms and its introduction was justified by referring to the tax the introduction of which had been renounced.

The legislator probably did not want the license fee to be considered a tax and not only specified in Article 34 (4) ELA a different time when the obligation to pay the license fee arises, but also pointed out that the model form for the payment of the license fee provided by the Council of Ministers applies to this fee, without calling it a tax return. Nevertheless, it should be noted that, pursuant to Article 34 (8) ELA, in matters concerning the license fee, the Act of 29 August 1997 – Tax Ordinance[33] shall apply accordingly. Given the broad definition of a tax return provided in Article 3 (5) of the Tax Ordinance,[34] it would be reasonable to assume that this provision also applies to the license fee form. This, however, would be contradicted by abandoning the application of the penal-fiscal sanction for non-performance or improper performance of the obligation to apply the form in a case related to the license fee, in favor of the administrative pecuniary penalty specified in Article 56 (1) (50) ELA.

Another important issue is to determine the status of the entity to which the license fee for offshore wind farms should be paid. The original assumption that the tax should be declared and paid to the appropriate head of the tax office was abandoned. It follows from §§ 3 and 4 of the Regulation of the Council of Ministers of 12 October 2021 on the license fee that it is the obligation of the energy company to calculate the license fee on its own, to submit to the President of the ERO the information on the calculation of the license fee and its amount using the official form, and to pay the fee to the bank account of the ERO by 15 April of the year following the year in which the obligation to pay the fee arose. In turn, § 5 (2) of the Regulation defines the duties of the President of the ERO in the event that an energy company has failed to correctly calculate the license fee and to pay it. The President of the ERO is obliged to immediately calculate the license fee and call upon the energy company to pay it in the correct amount within 14 days of receiving the call. Calculation of the correct amount of this fee should be done in the form of a specifying decision, as Article 34 (9) ELA provides for an ordinary appeal against the decision of the President of the ERO specifying the correct amount of the license fee. The lack of consistency in these provisions may be compensated for by proper application of Article 21 (3) of the Tax Ordinance, which contains symmetrical solutions with respect to decisions determining the correct amount of tax liability. Reference should also be made to Article 2 (2) of the Tax Ordinance, according to which if separate regulations do not provide otherwise, the provisions of Chapter III of the Tax Ordinance shall also apply to fees that authorities other than those mentioned in Section 1 (1) are authorized to

[33] Consolidated text, Journal of Laws 2021, item 1540, as amended.

[34] Pursuant to this provision, whenever the term "tax return" is used, it also means statements, lists, sheets, reports, and information that taxpayers, remitters, and collectors are obliged to submit pursuant to the tax law.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:20:19

impose or determine. In the context of Section 3 of the Tax Ordinance, the authorities referred to in Section 2, and therefore also the President of the ERO, have the powers of tax authorities. This view appears to be well established in case law.[35]

IS THE LICENSE FEE A TAX?

It should be noted that the provisions governing the license fee incorporate the majority of solutions originally intended for the tax on offshore wind farms. This applies in particular to its structural components, including its object, tax basis, rate, and amount. A license fee that applies only to the operation of an offshore wind farm is equal to the product of the installed capacity of the offshore wind farm specified in the license and a coefficient expressed in PLN, in the same amount, but resulting from the Regulation of the Council of Ministers. The rationale for introducing this fee is identical to that of the originally planned tax.

The reasons for the change in the nature of the public-law liability from a tax to a fee have not been officially communicated. As of 8 October 2020, the draft act, as filed with the Legal Committee, no longer provided for a tax on offshore wind farms.[36] It appears that what contributed to this was the recommendation contained in the Letter from the Minister of Finance dated 22 September 2020 (ref. PG2.6050.52.2020) addressed to the Secretary of the Standing Committee of the Council of Ministers. In the opinion of the Minister of Finance, the tax on offshore wind farms proposed in Chapter 10 of the draft act raised doubts, so "we should consider replacing this tax with a modification of the license fee, which would have the same economic and financial effects, including on the public finance sector". The failure to regulate a possible tax on offshore wind farms by a separate tax act caused reservations, which, due to its improper proceeding, posed a risk of its unconstitutionality being acknowledged by the Constitutional Tribunal. It was also pointed out that the new tax, contrary to the intentions of the authors of the draft act, would not be a property tax, but would contain hybrid solutions. Other objections concerned technical issues and referred to the adjustment of the rate and filing of tax returns.

Consequently, the view must be approved that the use of the word "fee" in place of "tax" was due to political concerns[37] and was deliberate. This is not the first time

[35] For example, in its judgment of 8 May 2019 (III SA/Łd 87/19, LEX no. 2681451), the Voivodeship Administrative Court in Lodz stated that if the President of the ERO found that the fee for the license to trade in liquid fuels had not been declared and paid, he should, pursuant to Article 21 (3) of the Civil Code, issue a decision determining the said fee.

[36] J. Wajs, *Był podatek, jest opłata. Zmiany w opodatkowaniu morskich farm wiatrowych*, 29.10.2020, https://globenergia.pl/comments/wajs-byl-podatek-jest-oplata-zmiany-w-opodatkowaniu-morskich-farm-wiatrowych (access: 8.7.2023).

[37] A. Kałążny, W. Morawski, *op. cit*.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:20:19

that the Polish legislator has avoided the term "tax" in new legislation, although it actually imposes taxes, especially on individuals. An identical mechanism was adopted when the sugar tax was introduced and called a fee on foodstuffs (a sugar fee). The term "fee" has a subconsciously less painful overtone, although it is not inferior to a tax in terms of fiscal severity.

It should also be considered whether the new mechanism of taxation of offshore wind farms in the form of a license fee (tax) is conducive to the implementation of the principle of tax equity and equal taxation. It is apparent from the explanatory memorandum for the draft act that, from a fiscal standpoint, the intent was to treat equally all electricity generation technologies, including RES technologies. In setting the appropriate rate, the guiding principle was that the license fee should be similar to the property tax payable for onshore wind power plant structures. In accordance with well-established case law of the Constitutional Tribunal,[38] the principle of equality, as expressed in Article 32 (1) of the Polish Constitution, prescribes identical treatment of entities that are in the same or similar legally relevant situation. "This principle prescribes the imposition of equal obligations on, or the granting of equal rights to, entities having the same essential characteristic, and at the same time permits, but does not require, the imposition of different obligations on, or the granting of different rights to, entities having that characteristic and entities not having it".[39] Referring to this understanding of the principle of equality, the SAC took the position that the legally relevant characteristic is not the production of electricity in general, but its production with the use of a wind turbine. Consequently, the business activity consisting in production of electricity from wind should be considered as the legally relevant characteristic. The legal situation of those entities in terms of determination of the object of the property tax is the same.[40] In support of the SAC's standpoint, it should be stated that the legally relevant feature is determined by the object of the fee (tax), i.e. performance by energy companies of a business activity consisting in generation of electric energy in an offshore wind farm. In the context of Article 32 (1) of the Polish Constitution, these entities should be treated in an identical manner. It also seems that the regulations that introduce the license fee (tax) are conducive to the achievement of tax justice. On the one hand, they eliminate the legal loophole that had existed for years, leaving offshore wind farms outside the tax system, thus ensuring the universality of taxation, but on the other hand, they do not significantly reduce the taxpayers' ability to pay.[41]

[38] Judgment of the Constitutional Tribunal of 13 December 2017, SK 48/15, OTK-A 2018, no. 2.

[39] *Ibidem*.

[40] Judgment of the Supreme Administrative Court of 7 October 2021, III FSK 221/21, CBOSA).

[41] A. Gomułowicz, *Zasada sprawiedliwości w polskim systemie podatkowym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1989, no. 3, p. 60.

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Data: 22/11/2026 12:20:19

CONCLUSIONS

The article analyzes and evaluates the legal solutions that constitute the principles of taxation of offshore wind farms in Poland. As a result of this analysis, the research hypotheses adopted for the purpose of the study were confirmed. Consequently, it should be stated that the solutions that govern the taxation of onshore wind power plants are not useful and cannot be adapted for the purpose of establishing a legal mechanism of taxation of offshore wind farms. The legislator is responsible for this state of affairs by permanently changing the rules of taxation of wind power plants in a manner leading to interpretation disputes in the doctrine and the judicature.

In this situation, the introduction of a new tax on offshore wind farms that is outside the jurisdiction of communes and municipalities is a reasonable solution. It seems that the way of defining the permanent characteristics of the new public levy and its calculation components should not be the object of interpretation disputes. However, there may be doubts as to whether the base station located onshore and the power cable in the sea connecting the wind power plant with the mainland are subject to the property tax.

For incomprehensible and purely political reasons, the tax on offshore wind farms was transformed into the so-called license fee. Unfortunately, this was done by a non-tax law. Although it may seem that the fee is "less painful", it does not change the fact that the license fee should be treated as a regular tax with all legal consequences, since the provisions of the Tax Ordinance apply to it. The new mechanism of taxation of offshore wind farms seems to implement the constitutional principles of fair and universal taxation and equal treatment of taxpayers who are in the same tax-law situation.

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Data: 22/11/2026 12:20:19

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ABSTRAKT

Od 18 lutego 2021 r. obowiązują przepisy ustawy o promowaniu wytwarzania energii elektrycznej w morskich farmach wiatrowych. W założeniu mają one upraszczać procedury administracyjne dotyczące pozyskiwania pozwoleń i zgód na realizację projektów offshore, a także przyczynić się do realizacji podjętych przez Polskę zobowiązań międzynarodowych w zakresie utrzymania i zwiększenia obowiązkowego udziału odnawialnych źródeł energii. Aktem tym znowelizowano również ustawę Prawo energetyczne, do której wprowadzono przepisy regulujące nową opłatę koncesyjną. Daninę tę obowiązane są obliczać i wpłacać na rzecz Urzędu Regulacji Energetyki przedsiębiorstwa energetyczne wykonujące działalność gospodarczą w zakresie wytwarzania energii elektrycznej w morskich farmach wiatrowych. W ocenie autora podmioty te są podatnikami nowego podatku, paradoksalnie nazwanego opłatą, którego wbrew pierwotnym założeniom nie wprowadzono, kierując się również czynnikami pozaprawnymi. W artykule poddano analizie regulacje prawne wprowadzające opodatkowanie morskich farm wiatrowych w Polsce na tle kontrowersyjnych rozwiązań normatywnych dotyczących opodatkowania podatkiem od nieruchomości elektrowni wiatrowych zlokalizowanych na lądzie.

Słowa kluczowe: morska farma wiatrowa; podatek; elektrownia wiatrowa; opłata koncesyjna