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Lokalizacja farm fotowoltaicznych przy braku miejscowego planu zagospodarowania przestrzennego

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Streszczenie

Wyczerpanie złóż paliw kopalnych nie jest już dziś jedynie pesymistyczną wizją przyszłości. Zapotrzebowanie gospodarki na energię elektryczną stale rośnie, co przy kurczących się zasobach tradycyjnych źródeł energii zmusza ludzkość do poszukiwania alternatywnych rozwiązań. Codziennością staje się pozyskiwanie energii ze źródeł odnawialnych, a jednym z nich jest energia słoneczna. Rozwijająca się technologia dostarcza coraz to nowsze rozwiązania techniczne, a w Polsce na popularności zyskują instalacje fotowoltaiczne. Ilość dostarczanej z nich energii elektrycznej uzależniona jest od wielu czynników, nie tylko od efektywności samych ogniw, ale również od powierzchni przez nie zajmowanej. W świetle obowiązujących przepisów przedsięwzięcia polegające na zabudowie systemami fotowoltaicznymi powierzchni nie mniejszej niż 1 ha, zaliczane są do przedsięwzięć mogących potencjalnie znacząco oddziaływać na środowisko, co pociąga za sobą konieczność przeprowadzenia postępowania w sprawie oceny oddziaływania na środowisko, a w dalszej kolejności uzyskania przez inwestora decyzji o pozwoleniu na budowę.
Możliwość uzyskania decyzji o pozwoleniu na budowę instalacji, jaką jest farma fotowoltaiczna, uzależniona jest od uzyskania decyzji o warunkach zabudowy lub decyzji o lokalizacji inwestycji celu publicznego. Na tym etapie organy administracji publicznej stają przed koniecznością rozstrzygnięcia, w którym trybie należy dokonać tego uzgodnienia. Obowiązujące w Polsce przepisy zdają się nie regulować tej kwestii w dość jednoznaczny sposób. W niniejszym opracowaniu dokonano analizy powyższego zagadnienia z punktu widzenia przepisów ustawy o planowaniu i zagospodarowaniu przestrzennym.

Słowa kluczowe: zagospodarowanie przestrzenne, ochrona środowiska

Location of photovoltaic farms in the absence of a local spatial development plan

Abstract:

Depletion of fossil fuel resources is no longer just a pessimistic vision of the future. The economy's demand for electricity continues to grow steadily and, given the dwindling stocks of traditional energy sources, makes humanity look for alternative solutions. Harvesting energy from renewable sources, for instance solar energy, is becoming commonplace. The development of technology offers more and more new technical solutions, and photovoltaic installations in the form of farms

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are growing in popularity in Poland. The quantity of electricity they generate depends on multiple factors, not only the efficiency of the cells as such, but also the size of the area covered. In light of existing regulations, projects based on the development of photovoltaic systems whose area is at least one hectare are classified as projects that may potentially have a significant impact on the environment, which makes it necessary for the investor to conduct an environmental impact assessment procedure and then obtain a building permit.
The possibility of obtaining a building permit for a photovoltaic farm installation depends on obtaining a decision on land development and management conditions or a decision on the location of public purpose investment. At this stage, administrative bodies are faced with the need to decide how the required arrangements are to be made between administrative bodies. Legislative instruments in force in Poland do not seem to regulate this issue in a sufficiently clear manner. This study analyses the above issue from the viewpoint of the current provisions of the Spatial Planning and Development Act.

Keywords: spatial planning, environmental protection

1. Introduction

Today's society can be described as energy-based, both on the global and local scale, because its functioning and social and economic development are dependent on access to electric energy. The limited and systematically depleting stocks of non-renewable energy sources, mainly fossil fuels, can no longer form a long-term point of reference for energy policies of individual states or communities of states. Importantly, however, use of fossil fuels as a source of electric energy contributes to ongoing environmental degradation and accelerates climate change. This results in the need to successively shift the burden of providing raw materials used to generate electric energy from fossil fuels to renewable energy sources (RES). One of such sources of electric energy are photovoltaic installations, including "photovoltaic farms," that is photovoltaic systems whose developed area exceeds 1 hectare and the total installed electric power is more than 500 kW. Faced with the inevitable vision of introducing RES as the regular, and over time the dominant pillars of electric energy supply, it is worth examining the legal regulations which determine the feasibility of carrying out this kind of investments.

The purpose of this analysis is to identify the possibility of carrying out an investment which consists in erecting photovoltaic farms in the absence of a local spatial development plan. This issue is regulated by a number of

statutes,[3] which means that both investors and public administration bodies encounter difficulties related to properly conducting administrative proceedings aimed at implementing such an undertaking.

This study analyses the issue of locating photovoltaic installations from the viewpoint of provisions of the Spatial Planning and Development Act and the Real Estate Management Act. Defining the object of the study in this manner is motivated by uncertainty whether an undertaking that consists in erecting a photovoltaic farm may be considered a public purpose investment, which in turn allows a simplified process of carrying out such investments if no local spatial development plan exists, or whether a decision on development conditions must be first obtained.

2. The notion of public purpose

The most important legal instrument that uses the notion of public purpose is Article 21, item 2 of the Constitution of the Republic of Poland, which stipulates that expropriation is permitted solely for public purposes and for just compensation. The Constitution does not discuss the meaning of this notion in detail, leaving the issue of defining a "public purpose" to the legislator. This definition is found in the Real Estate Management Act of 21 August 1997, whose Article 6 enumerates a list of investments which can be classified as public purposes. As noted by Ewa Bończak-Kucharczyk,[4] this provision does not specify any criteria or methods for classifying a particular investment as a public purpose. Instead, it contains a list (enumeration) of various actions, structures or activities classified as public purposes.

Article 6 of the REMA, cited above, enumerates the kinds of undertakings that may be considered a public purpose and, as a rule, is a closed list, except for the limited possibility of extension provided for in point 10, which stipulates that public purposes may be specified in separate statutes. Following Katarzyna Małysa-Sulińska,[5] it should however be stressed that classifying an undertaking as a public

[3] Przykładowo zagadnienie powyższe jest uregulowane w następujących aktach prawnych:
- ustawie z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym (tekst jedn.: Dz.U. 2020 poz. 293),
-ustawie z dnia 7 lipca 1994 r. Prawo budowlane (Dz.U. 1994 nr 89 poz. 414 ze zm.),
-ustawie z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (Dz.U. 1997 nr 115 poz. 741 ze zm.),
-ustawie z dnia 3 października 2008 r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz ocenach oddziaływania na środowisko (tekst jedn.: Dz.U. 2021 poz. 247),
-rozporządzeniu Rady Ministrów z dnia 10 września 2019 r. w sprawie przedsięwzięć mogących znacząco oddziaływać na środowisko (Dz.U. 2019 poz. 1839 ze zm.),
- ustawie z dnia 20 lutego 2015 r. o odnawialnych źródłach energii (Dz.U. 2015, poz. 478 ze zm.),
- dyrektywie Parlamentu Europejskiego i Rady (UE) 2018/2001 z dnia 11 grudnia 2018 r. w sprawie promowania stosowania energii ze źródeł odnawialnych (Dz. Urz. UE L 328/82).

[4] E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2018, s. 82.

[5] K. Małysa-Sulińska, *Zakres przedmiotowy przedsięwzięć, dla których warunki zabudowy i zagospodarowania terenu określane są w formie decyzji o ustaleniu lokalizacji inwestycji celu publicznego*, „Casus" 2009, nr 3, s. 6–9.

purpose is only permitted when such an undertaking has been defined as such in an instrument equivalent to a statute. The cited author correctly argues that "a public purpose defined in a separate statute" can mean only an undertaking for which this designation was not reserved solely for the needs of that separate statute. Analogous conclusions may be drawn after analysing the contents of the Supreme Administrative Court judgement of 15 May 2008,[6] in which the court stated that while the [Article 6] list does contain some interpretative loopholes, such as the clauses of state defence or public security, they do need to be construed restrictively with respect to provisions found in other statutes, according to the legal purpose of Article 6 of the Real Estate Management Act, which is to establish a clearly limited number of instances in which the notion of public purpose may be used.

Considering the above, a question arises whether a specific undertaking can be classified as a public purpose through the interpretation of separate provisions. As stated by Kamila Lewandowska and Tomasz Lewandowski,[7] according to the static theory of interpretation, whenever the linguistic, systemic and teleological interpretation directives collide, priority should be given to linguistic in preference to systemic interpretation, while according to the dynamic theory of interpretation, teleological interpretation is preferred in such cases. Here it should be noted, following Lech Morawski,[8] that when an administrative law provision is construed using the teleological interpretation method, care must be taken to account for generally accepted moral norms and the principles of justice and equity when interpreting legal provisions. By generally accepted norms and principles we mean core rules having universal application, that is rules accepted by the entire international community, or at least rules important in our cultural environment.

3. The location of photovoltaic farms in light of applicable legal regulations

Pursuant to Article 29, item 6 of the Construction Law Act, a decision on building permit is required for undertakings for which it is necessary to conduct an environmental impact assessment, as well as undertakings which require an environmental impact assessment related to a Natura 2000 area, pursuant to Article 59of the Environmental Information Disclosure Act (...). Pursuant to Article 59, item 1 of the above act, conducting an environmental impact assessment is necessary prior

[6] Sygn. II OSK 548/07, LEX nr 503449.

[7] K. Lewandowska, T. Lewandowski, *Wykładnia celowościowa i językowa w prawie administracyjnym. Wytyczne doktryny i praktyczny przykład ich zastosowania*, „Samorząd Terytorialny" 2010, nr 9, s. 19–29.

[8] L. Morawski, *Zasady wykładni prawa,* Toruń 2006, s. 147.

to conducting a planned undertaking that might at all times have a major impact on the environment or that might potentially have a major impact on the environment if the obligation to conduct an environmental impact assessment for that undertaking has been confirmed, pursuant to Article 63, item 1 of the act, by means of a ruling of an authority competent to issue decisions on environmental conditions.

The issue of classifying an undertaking as one that might at all times or potentially have a major impact on the environment is handled by provisions of the regulation of the Council of Ministers of 10 September 2019 on undertakings which may have a major impact on the environment. Pursuant to its section 3, point 54, undertakings that may have a major impact on the environment include industrial development, including development with photovoltaic systems, or warehouse development, together with accompanying infrastructure, whose size is not less than 0.5 hectare in areas covered by nature protection forms (...) or not less than 1 hectare on areas other than listed above. This kind of undertaking also requires obtaining a decision on building permit; pursuant to Article 33, item 2, point 3 of the Construction Law Act, the application for the decision should be combined with a land development conditions decision, if such is required according to spatial planning and management provisions.

Moving to provisions of the Spatial Planning and Development Act (hereinafter SPDA), it should be highlighted that when no local spatial development plan has been adopted for the area in question, erecting a building structure may occur pursuant to Article 4 of the above act. One of the prerequisites is the location of a public purpose investment, and the other, the proceedings to issue a land development conditions decision. As stipulated by Article 59, item 1 of the act, in the absence of a local plan a change of land development consisting in erecting a building structure or performing other construction works (...) requires determining the development conditions by means of a decision.

As stipulated by Article 61, item 1 of the SPDA, issuing a decision on conditions of development is only possible when all the following conditions listed in that provision are met. This includes the good neighbourhood principle, according to which a decision on conditions of development may be issued if at least one adjacent plot accessible from the same public road is developed in a manner allowing to identify the requirements of new developments as regards the continuation of functions, parameters, features and floor area ratios (Article 61, item 1, point 1 of the act).

Due to the nature and location of areas in which undertakings consisting in

the erection of farms are planned to be carried out, fulfilling the good neighbourhood requirements is often impossible. At the same time, it should be noted that Article 61, item 3 of the act waives the necessity of complying with the good neighbourhood principle when choosing the location of infrastructural facilities. Accordingly, investors planning to erect photovoltaic farms have demonstrated during proceedings that their undertaking can be classified in this group, an argument that however did not find favour with authorities issuing decisions on development conditions, nor in judicial decisions. As noted by the Supreme Administrative Court in its judgement of 18 July 2005,[9] technical infrastructure structures serve to supplement the original purpose of land within and without the area under consideration and their function is subservient to the residential, agricultural or industrial role, for example by supplying water, electricity, gas, etc. Such facilities are therefore assumed to not interfere with preserving the original function of the analysed area. The preservation or change of the function may be decided by structures to which technical infrastructure structures are appended, and not the latter structures themselves. The Supreme Administrative Court has further explained that waiving the principle of good neighbourhood should not infringe upon the former function with respect to land development and improvement. Similar arguments were advanced by the Regional Administrative Court in Gorzów Wielkopolski in its judgement of 13 March 2019,[10] noting that a photovoltaic installation located on land used for agricultural cultivation usually results in managing such land in a new manner. This kind of facilities prevents the land from being used for its former purpose and from this viewpoint cannot be considered as infrastructural facilities.

A different position was taken by the Regional Administrative Court in Łódź in a judgement of 16 July 2019,[11] which asserted that photovoltaic farms are technical infrastructure facilities. In discussing its arguments, the court contended that pursuant to Article 3, point 9 of the Energy Law Act facilities mean technical facilities used in energy processes, while Article 3, point 7 of the same act stipulates that energy processes are technical processes used to produce, process, transmit, store, distribute and use fuels or energy.

Adopting the view that photovoltaic farms are not technical facilities referred to in Article 61, item 3 of the SPDA has led to considerable hindrances in locating and erecting such farms. Hence, by an act of 19 July 2019 amending the Renewable Energy Sources Act and certain other acts, the legislator decided to amend the

[9] Sygn. II OPS 3/05 Centralna Baza Orzeczeń Sądów Administracyjnych.

[10] Sygn. II SA/Go 63/19, Centralna Baza Orzeczeń Sądów Administracyjnych.

[11] Sygn. II SA/Łd 312/19, Centralna Baza Orzeczeń Sądów Administracyjnych.

provision of Article 61, item 3 and explicitly mention renewable energy source installations. The wording of that provision is now that the provisions of item 1, points 1 and 2 do not apply to railway lines, linear structures and technical infrastructure facilities, as well as renewable energy source installations in the meaning of Article 2, point 13 of the Renewable Energy Sources Act of 20 February 2015 (hereinafter RESA). The regulation cited above defines a renewable energy source installation as an installation consisting of a separate assembly of energy generation facilities which have certain technical and commercial parameters and are used to produce energy from renewable energy sources.

It should be stressed however that the amendment cited above did not ultimately solve the issue of waiving the principle of good neighbourhood with respect to the location of photovoltaic farms. The justification to the draft act amending the Renewable Energy Sources Act suggests that its Article 4 introduced changes to the SPDA by modifying the previous principle applicable to spatial development plans and location of buildings, allowing microinstallations to be situated on them which utilise not only wind, but especially photovoltaic technologies.[12] Introducing the discussed amendment was not, therefore, intended to waive the principle of good neighbourhood in case of proceedings to issue a decision on development conditions for erecting photovoltaic farms but solely with respect to microinstallations situated on existing buildings. Although the justification of a draft legal instrument is not a source of law, when doubts concerning the application of law arise its contents allow a provision to be used to derive a procedure norm through authentic and teleological interpretation.

In light of the above findings, it needs to be considered whether issuing a decision on location of a public purpose investment is justified in case of undertakings being the object of the present study. To analyse this question, we must start with Article 2, point 22 of the RESA which defines renewable energy sources as renewable, non-fossil energy sources that include wind and solar radiation energy. At the same time, Article 6, item 4 of the Real Estate Management Act of 21 August 1997 stipulates that construction and maintenance of facilities used for environmental protection is a public purpose. It is common knowledge that burning fossil fuels in order to produce electric energy results in emissions of CO_2 and other pollutants to air. Increasing the share of renewable energy sources in the total production of electric energy thus leads to decreasing such emissions and is thereby contributive

[12] Rządowy projekt ustawy o zmianie ustawy o odnawialnych źródłach energii oraz niektórych innych ustaw, Internetowy System Aktów Prawnych www.isap.sejm.gov.pl (druk sejmowy nr 3656 z dnia 9 lipca 2019 r., s. 26).

to protecting natural environment.

This view has been reflected in the contents of the 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. The preamble itself in point (44) notes that: “For the benefit of the rapid deployment of energy from renewable sources and in view of their overall high sustainable and environmental beneficial quality, Member States should, when applying administrative rules or planning structures and legislation which are designed for licensing installations with respect to pollution reduction and control of industrial plants, for combating air pollution, or for the prevention or minimisation of the discharge of dangerous substances in the environment, take into account the contribution of energy from renewable sources towards meeting environmental and climate change objectives, in particular when compared to non-renewable energy installations.” Further, point (45) of the preamble states that “coherence between the objectives of this Directive and the Union's other environmental law should be ensured. In particular, during assessment, planning or licensing procedures for renewable energy installations, Member States should take account of all Union environmental law and the contribution made by energy from renewable sources towards meeting environmental and climate change objectives, in particular when compared to non-renewable energy installations.” The above proposals have been reflected in the contents of the directive where, for example, Article 15(3) imposes on the Member States the obligation to ensure that their competent authorities at national, regional and local level include provisions for the integration and deployment of renewable energy.

Transposing these remarks to Polish law, one should, following E. Bończak-Kucharczyk, stress that the lack of REMA criteria which would allow assessing what should and should not be a public purpose does not mean that such criteria cannot be identified by interpreting the provisions of the Constitution of the Republic of Poland. If, therefore, the Constitution uses the notion of public purpose, the criteria for determining such purpose must also result from the basic law. (…) In assessing such admissibility, the public purpose of the objective, one related to universal access to a certain good, is not without importance.[13]

Since domestic provisions did not unequivocally regulate the issue of whether renewable energy sources can be classified as facilities used for environmental protection, one should, admitting the principle of primacy of EU law, the principle of loyalty and the principle of direct application, unquestionably consider that in case of

[13] E. Bończak-Kucharczyk, *op. cit.*, s. 83.

a conflict between domestic and EU provisions or lack of suitable domestic regulations, EU regulations will be applied, as directly provided for by Article 91, item 3 of the Constitution of the Republic of Poland.[14] Article 36 of the cited directive sets the deadline for transposing its provisions to the legislation of Member States to 30 June 2021. Poland therefore still has some time left to pass suitable amendments or separate new legal instruments.

The constitutional grounds for granting public purpose status to photovoltaic farms can be derived from Article 74 in connection with Article 5 of the Constitution of the Republic of Poland. As noted by S. Dudzik, "Article 5 of the Constitution suggests that, among others, ensuring the security of citizens is an obligation of the Republic of Poland. This means in particular the need to ensure energy security." The Constitutional Tribunal in its judgement of 25 July 2006[15] defines this obligation widely, as striving towards both existing and projected energy needs in conditions specified in Article 74, item 1 of the Constitution of the Republic of Poland while taking into account the environmental security of existing and future generations. Energy security is achieved both by actions concerning the current status of the energy sector and the rights and obligations of all the entities of which the sector consists and which use the goods and services it produces, and by actions aimed at achieving specific objectives in the future. It appears important that the Constitutional Tribunal does not in any way suggest that current energy needs have priority over the needs of future generations. The obligation of public authorities is, therefore, to treat both these obligations on an equal footing, including by ensuring that the energy sector is organised so as to prevent shifting the major burden of contemporary energy consumption to the future.

It must be remembered that not all available methods and means of ensuring energy security are allowed in light of the Polish Constitution. An equally important obligation for the legislator is the obligation to protect the environment, including the need to ensure environmental security to the current and future generations (Article 5, Article 74, items 1 and 2 of the Constitution). In light of the final phrases of Article 5 of the Constitution, the general trend is here defined by the principle of sustainable development. It should be stressed that in light of the Constitution the obligation to care for the condition of the environment is not limited to state authorities, but has a universal nature, binding everyone. Everyone is also responsible for deterioration of the environment they have caused (Article 86 of the Constitution). In this context,

[14] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. 1997 nr 78 poz. 483 ze zm.).

[15] Sygn. akt P 24/05, Dz.U. 2006 nr 141 poz. 1012.

the environment becomes an objective value, and its protection and the sustainable development principle are ranked among the basic values informing the axiology of the Polish constitutional order. The energy sector can therefore be developed only in compliance with the above values and with the additional requirement of intragenerational environmental ethics.[16]

Article 86 of the Constitution, which stipulates that everyone is responsible for the environment and bears liability for any deterioration they have caused, imposes an obligation to protect the environment on public authorities. As noted by Kazimierz Działocha and Agnieszka Łukaszczuk,[17] such an obligation translates to supporting citizen activities to protect and improve the environment. One form of such support is also aiding other entities to take up initiatives such as increasing the share of renewable energy sources in electric energy production, which is beyond all doubt aligned with the above proposals. Considering however that the above arguments, aimed at justifying the granting of the public purpose status in the meaning of Article 6 of the REMA to photovoltaic farms, do not withstand confrontation with the view, established in legal theory and judicial decisions, that the list of public purposes is closed, one needs to reflect whether it would not be advisable to extend it by undertakings such as photovoltaic farms.

This proposal seems to be supported by trends in activities of governmental institutions, among them the Minister of State Assets, who on 30 December 2019 submitted a national energy and climate plan for 2021-2030[18] to the European Commission, thereby fulfilling the obligation imposed on Poland by provisions of a regulation of the European Parliament and the Council. The document defines, among others, the main objectives of Poland's energy policy, which include eight strategic directions, and specifically: (1) optimum utilisation of own energy resources, (2) extension of electrical production and transfer infrastructure, (3) diversification of supplies and extension of the natural gas, oil and liquid fuels transfer grid, (4) development of energy markets, (5) implementation of nuclear power, (6) development of renewable energy sources, (7) development of the heating sector and combined heat plants, (8) improvement of energy efficiency in the economy. The document recommends a step-by-step diversification of energy media by increasing

[16] S. Dudzik, P. Kardas (red.), T. Sroka (red.), W. Wróbel (red.), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla, tom 1, Zagadnienia szczególne, Konstytucyjne ramy polskiego prawa energetycznego*, SIP LEX, 2012.

[17] K. Działocha, A. Łukaszczuk, L. Garlicki (red.), M. Zubik (red.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 2, 2016, SIP LEX.

[18] [online] www.gov.pl/web/aktywa-panstwowe/krajowy-plan-na-rzecz-energii-i-klimatu-na-lata-2021-2030-przekazany-do-ke.

the share of RES (whose role in electric power generation will grow primarily due to wind energy and photovoltaic installations). On the operational level, increasing the share of stable renewable energy sources is proposed. (...)[19] Considering this, it should unquestionably be assumed that the activities proposed in the above-cited document are an objective of supralocal importance and require Poland to abide by its international obligations in order to be achieved.

4. Conclusions

In light of the above, it should be assumed that the erection and operation of photovoltaic farms, even though they have not been included in the closed list of public purposes in the meaning of Article 6, item 4 of the Real Estate Management Act, undoubtedly serves to further the objectives of environmental protection by supporting national energy security, as well as objectives of local and supralocal importance. As a result of this analysis, it may be concluded that the Polish legal system does not contain any unequivocal regulations in this respect, and agreement procedures at the stage of planning investments of that kind are still very time-consuming, which hardly contributes to their development and delays Poland's compliance with its international obligations related to climate policy. It is natural for the legislative process to be one step behind the development of science and technological progress; however, it appears right to propose that the issues of renewable energy sources and their utilisation be moulded into comprehensive and coherent legal norms as soon as possible. As for now, however, it is reasonable for the legislator to extend the list of public purposes defined in Article 6 of the Real Estate Management Act by undertakings whose objective is the location, erection and operation of photovoltaic farms.

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[19] *Krajowy plan na rzecz energii i klimatu na lata 2021-2030, Założenia i cele oraz polityki i działania*, https://www.gov.pl/ web/aktywa-panstwowe/krajowy-plan-na-rzecz-energii-i-klimatu-na-lata-2021-2030-przekazany-do-ke, s. 11.

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