EU Energy Law

EU Energy Law:
Constraints with the Implementation of the Third Liberalisation Package

Edited by

Robert Zajdler

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INTRODUCTION

MAREK WOSZCZYK
PRESIDENT OF THE ENERGY REGULATORY OFFICE
IN THE REPUBLIC OF POLAND

European Union law determines the form of a legal environment in which the Polish energy sector operates. According to the political declarations of the Summit of the Member States on 4th February, the energy market should be completely integrated by 2014. Every member of this market has to accelerate their work in order to eliminate all the barriers to development in the domestic market and prepare the market's infrastructure for integration, at least on a regional level.

After several years of liberalization of national energy markets and harmonization of legal regulations, the 3rd Liberalization Package appoints common European institutions and provide them with means to complete the integration process. European Network Transmission System Operators (ENTSO) and Agency for Cooperation of European Regulators (ACER) are given rights and obligations necessary to harmonize the markets. Their work will ensure of the markets' integration and the fulfillment of the European energy policies. Guarantee of their pro-community action is the status of an independent regulator, which has to be provided by national law; and the status of independent operators verified during the certification process conducted by the regulator and the European Commission. The common network codes established on the ENTSO forum were developed to: eliminate technical barriers, enable trade across national borders due to common rules for the functioning of markets; and joint infrastructure projects, which will enhance the security and diversification of sustainable energy. The synergy of these activities can also create greater opportunities for a common energy policy dialogue with the third countries.

Proper implementation of solutions from the 3rd package into national legislation is the basis for effective integration and creation of a common market in which the center of attention is the recipient and not regulation per se. Therefore, III package confirms and extends many consumer rights. The new regulations provide recipients of the energy with clear and

transparent information about, inter alia, prices, data of energy and gas consumption, information about their rights. Information about recipient's rights shall be provided on the websites of suppliers and bills for the media. Moreover, the Member States have to prepare the so-called contact points where consumers can obtain information about their rights and means of settling disputes.

III package also results in reinforcement of the position of the regulator. Proper definition of energy market regulator's position - the institutional, human and financial - is in the interest of the market. The independence status of a regulator of a given State, defined in its national legislation, will have a significant impact on the ability to achieve market-oriented objectives in a national aspect. Analysis of the competence of the regulators and ACER shows that the position of the regulator goes beyond present regulatory issues (mostly price regulation), supervision (mainly over operators) and currently is leading in many other areas of energy policy.

The general objectives of regulators in the European energy market are conditioned by the goals of EU energy policy, which are based on three fundamental pillars: security of supply, competitiveness and sustainable development. In relation to the mission of regulators in the European market, they can be grouped into three basic areas: the development of regional markets and subsequently full integration of the European market of electricity and natural gas; improving energy efficiency and developing renewable sources of energy; protecting the customers.

Taking into account the duties and responsibilities of regulators, in addition to the basic tasks that include setting tariffs for energy companies providing following infrastructure services: transmission, distribution, storage and access to LNG, the issues of effective monitoring of the market's rules as well as behavior of companies in this market, gain a new meaning.

The implementation of the 3rd liberalization package in Poland has just begun. Does the regulator have a real impact on the functioning of the energy market? Is it possible to meet the demands of modernization? An attempt to answer these questions is the publication "EU Energy Law. Legal constraints with the Implementation of Third Liberalisation Package." Team of authors, invited to cooperate in creating the publication, provides an interdisciplinary perspective and bold analysis of the quality of law created by the European Union. The study presents important issues related to energy sector cooperation between stakeholders (Mr Arkadiusz FALECKI, *Regulatory agreements in energy sector)*; promoting competitiveness (Mrs Kamila KLOC-EVISON, Ph.D and Mrs

Dagmara KOSKA, Ph. D., *Competition law mechanisms as additional tool of the III energy package implementation*), the regulator's tasks in respect to expansion of gas infrastructure (Mrs Maria MORDWA, *Gas strategic reserves regulation in Poland and its compliance with EU law*), the licensing of energy companies (Mr Zdzisław Muras, Ph. D., *Legal Aspects of Electricity and Gas granting and licenses permits in the light of the Third Liberalisation Package*), gas tariffs (Mr Marcin NOWACKI, Ph. D., *Legal aspects of tariffs under the Third Energy Package – A case of The Polish Gas Sector*), independence of the regulator (Mr Bartłomiej NOWAK, Ph. D. – *Independence of the Polish energy regulator after the Third Energy Package. Chosen aspects.*), intelligent networks (Mr Mariusz SWORA, Ph. D. – *Smart metering and unbundling - between centralisation and decentralisation*), the significance of interconnectors for cross-border exchange in electricity and gas (Mr Robert ZAJDLER, Ph. D. – *Legal aspects of electricity and gas interconnectors with third countries*).

This book perfectly captures the *spirit of change* that accompanies the debate about the modernization of the Polish and European energy sector. I wish you an interesting reading.

INTRODUCTION

JAKUB JÓŹWIAK,
THE EUROPEAN LAW STUDENTS' ASSOCIATION ELSA POZNAŃ

From the very beginning of its existence, one of the main goals of the European Law Students' Association ELSA is the development of legal education by allowing young lawyers and law students to learn other legal systems in the spirit of a constructive dialogue. This task has been implemented for more than 30 years in 42 European countries by organizing several hundred study and research projects in over 200 universities.

Nevertheless, this attitude appears to be inadequate today.

The dynamic changes that we can observe in the modern world affect the lawyers and shape their attitudes. For this reason our association's activities are designed not only to present other legal systems but they also try to introduce young lawyers to new branches of law and the challenges they bring.

The best example of these occuring changes is the energy law, which is rapidly gaining not only in popularity among the practitioners of law, but also in the significance in the contemporary legal and economic system. The specificity of this branch of law contains characteristics typical for the administrative law or public economic law and at the same time is strongly shaped by the EU law, which makes coherent approach to the individual aspects of the energy law extremely difficult.

The European Law Students' Association ELSA Poznań already recognized this situation several years ago. As a result, in 2011 the first International Conference on Energy Law was organized at the Faculty of Law and Administration of Adam Mickiewicz University in Poznań, Poland. The conclusions reached during the four panel discussions at the Conference constitute the basis and starting point for this publication.

This book, because of its academic origins, attempts to meet the challenges and overcome the difficulties pointed out above. In consequence of authors' diversity, from the theorists and practitioners of the law to the representatives of public administration, this book ensures a complete and competent analysis of discussed issues.

Although, this would not be possible if it was not for the support and hard work of many people; from the authors who determine the scientific quality of the publications, to members of the European Law Students' Association ELSA Poznań involved in the editorial work.

Special thanks and appreciation to Mr. Robert Zajdler Ph.D., the main editor of this publication, for the construction of its thematic scope and coordinating the work of other authors. I should also mention Mr. Artur Różycki, Chairman of the Board of ENEA Operator, who has supported our initiative from the very beginning in terms of content and organization.

Finally, I hope that this publication will fulfill all the expectations and it will be a permanent fixture in the canon of books about energy law in the European framework,

CHAPTER ONE

REGULATORY AGREEMENTS IN ENERGY SECTOR

ARKADIUSZ FALECKI[1]

Introduction

In regulated sectors, such as telecommunications, the energy industry, railways or aviation, administrative authorities, so-called market regulators, wield considerable power over the market players which are active in these sectors of the economy. The activities of the regulatory authorities are aimed at substituting, replenishing and stimulating competition, lack of which is inherent within the structure of some markets. In some markets lack of competition is of a permanent nature, e.g. in the case of grid services in the energy sector or the railway infrastructure market, and in some it is only a developmental phase of the market before its liberalization, e.g. in the electricity wholesale market or the railway transport market; elsewhere, lack of competition (as in the case of Poland) is determined for historical reasons by the position of incumbents, mainly state monopolies.

Both Community and national legislators have adopted a number of acts which define the public service obligations of the regulated entities, impose obligations regarding the regulation of prices of available services or goods, and specify the terms of reference of the regulatory authorities towards the sector. This translates into a very specific regulatory environment, based on a system of prohibitions and orders, liberalization goals and implemented policies.

However, in this article I will focus not on the substantive rules concerning a specific market or an energy sector in the broadest sense, but

[1] Arkadiusz Falecki, M.A. (Law), L.L.M. (Amsterdam), associate at GWW Woźny Wspólnicy, <falecki@gmail.com>. The views expressed in this article are those of the author alone.

on the way the market regulator acts. In particular, I will try to exemplify by means of practical cases that it is possible to depart from actions based strictly on decision-making power, that are defined unilaterally by the regulator for the benefit of the regulatory agreement, or consensual bilateral actions within the scope of the energy market.

For the purposes of this study, a regulatory agreement (*porozumienie regulacyjne*) is a bilateral agreement concluded between the regulated undertaking and the regulator, which consensually defines desired objectives and vital goals from the viewpoint of the regulations or public interest. In this agreement, detailed regulatory conditions and terms are from first to last a result of consent between the entrepreneur and the regulator. The originality of such an approach consists in the fact that on the one hand, it is related comprehensively to the company's activity, and simultaneously, it also includes the obligation of the regulatory authority in relation to specific actions.

Within the framework of the agreement all aspects of the entrepreneur's activity may be regulated – not only those at issue in the current settlements that are based on decision-making power. The energy company may commit itself to a number of actions, including actions not related directly to the fulfillment of regulatory duties, but which, if taken, may contribute to the development of competition, to an improvement in quality of the services performed, or to increased investment. In the regulatory agreement, the regulatory environment of such an undertaking is defined for several years, which can increase the stability of legal affairs and reduce administrative burdens. On the other hand, the regulatory authority is assured of the achievement of socially relevant goals.

The regulatory (administrative) agreement was a subject under discussion in Polish administrative legal doctrine, which will be presented in the first section of this chapter. The next section shows a practical case in which a regulatory agreement was established in the telecommunications sector in the form of an agreement between the President of the Office of Electronic Communications and Telekomunikacja Polska S.A. (*Polish Telecom*), and the proposal to implement such a solution in a Bill of Energy Law presented by the Ministry of Economy. Next, I will describe the institution of a regulatory agreement proposed by the Polish incumbent in the gas market for the gas release programme. In the summary, the main benefits resulting from the implementation of such a regulatory tool will be presented.

Regulatory agreement in Polish administrative law

The form of intervention of an administrative authority should match the needs and tasks of the administrative institution and be applied accordingly with the principle of proportionality. At the same time, considering Art. 7 of the Constitution, pursuant to which "*the organs of public authority shall function on the basis of, and within the limits of, the law*," legal forms of performance of administration[2] should be supported by the provisions of the law, so as to make the activities of the administrative authority predictable and verifiable for the addressees of these activities.

Contrary to sources of law, whose closed catalogue is included in Art. 97 of the Constitution, there is no legislative act in which the whole catalogue would be included, concerning all forms of legal activities under which public administration operates. At present, there is no act which provides for a conclusion of an administrative agreement; nevertheless consensual forms of activities by the administration might be indicated, as well as a number of references made to the doctrine that calls for the introduction into the legal order of an institution of administrative agreement, which seems to be nearest to the definition of an agreement.

The basic form of administrative performance in individual cases of entities is an administrative decision. Although in some cases decisions are made in cooperation with their parties in the administrative proceeding, it is pointed out in the legal literature that an administrative decision is a eligible form of an individual administrative act, i.e. "*an activity based on the decision-making power of a legal administrative organ, aimed at having particular, individually specified legal effects*."[3]

In an administrative proceeding, leading up to the issuance of an administrative decision, even in the case where the issuance of a decision is possible only after being authorized by a party (after an appropriate motion has been filed), the competence to define its content rests unilaterally with the public authority.[4] This authority is bound by the

[2] The term of legal action forms of administration is the object of comprehensive research and analysis in administration studies. Foundation for this research are works by J. Starościak – *Legal Action Forms of Administration*, Warsaw, 1957 and M. Zimmermann – *Forms of Activities of Public Administration. The Administrative Act.* (In:) M. Jaroszyński, M. Zimmermann, W. Brzeziński, *Polish Administrative Law. The General Part*, Warsaw, 1956

[3] E. Ochendowski – *Administrative Law. The General Part.* Toruń, 2002, p. 169.

[4] A. Wróbel – *An Updated Comment on Art. 104 of Code of Administrative Proceedings* (Kodeks Postępowania Administracyjnego), eLEX 2012

substantive provisions of the law, but within the particular circumstances and framework of the case may proceed at its sole discretion and independently define the rights and duties of a party. An administrative decision is a declaration of will on the part of the administrative authority in relation to administrative law, to which, however, provisions of civil law concerning a defect in the declaration of will are not applied.[5]

Taking into account the definition of a regulatory agreement proposed in the introduction, it should be pointed out that there are forms of administrative performance stipulated in administrative law which do not have the character of unilateral and individual decisions based on decision-making power. Such institutions are provided by settlements (*ugoda*), arrangements (*porozumienie*), and administrative agreements (*umowa administracyjna*).

Parties to the administrative proceeding have the right to issue motions for settlement before an administrative authority; in this way parties may, within the law, form their rights and duties. Parties may settle, for reasons of the nature of the case, if this contributes to the simplification or acceleration of the proceeding and there is no provision of law opposing it (Art. 114 KPA, *Polish Code of Administrative Proceedings*). The approved settlement has the same result as a decision issued in the course of an administrative proceeding.

The public authority may refuse the settlement by the party only in three cases: when there is breach of law, an undermining of public interest, or a legitimate interest of the parties, as well as non-consideration of the position of an authority, whose cooperation would be necessary while issuing a decision in a pending case (Art. 118 KPA). Within the presented legal framework, parties to the proceeding may freely formulate the subject of the settlement, which allows a presumption that a settlement made by the parties can be different from the decision of an authority, made on the basis of the whole evidence.

Another bilateral form of administrative performance is a so-called administrative agreement. The term is used in relation to many institutions, nevertheless it has been commonly accepted that an administrative agreement is an agreement between two administrative authorities, concluded in order to assign tasks related to public administration or the joint performance of such tasks. B. Dolnicki classifies the following as the most important features of an administrative agreement: the fact that the parties to the agreement are public authorities; equivalence of the parties

[5] So in the verdict of the Supreme Administrative Court in Warsaw of 3 December 1990, file ref. no. II SA 740/90.

to the proceeding; legal efficiency only within the scope of competence of the authority; the aim and subject of the agreement is joint action while performing tasks of public administration.[6]

Nowadays, administrative agreements are set up mostly by local government authorities, resulting from the provisions of local government acts.[7] Critical voices which form legal doctrine against the institution of the "competence" agreement should be emphasized, indicating that the transfer of remits between public authorities complicates the division of these competences within the defined system of public administration and makes it more difficult for citizens to be aware of the structure of competences amongst the administration's authorities.[8]

A bilateral form of administrative activity is also an administrative agreement. The administrative agreement is widespread outside Poland.[9] In the Polish system of law, the following institutions are indicated as characterizing an administrative agreement: the agreement on delegating tasks related to welfare services,[10] or the agreement on admission to treatment according to statutory sickness insurance schemes[11]. The administrative agreement is a bilateral agreement, concluded between an administrative authority and a private entity, whose aim is the performance of public tasks to satisfy the public interest.[12]

A. Panasiuk, when analyzing case law to date, indicates the following elements as making up an administrative agreement: (i) one party (or both parties) is a public authority; (ii) the purpose of the contract is to perform public tasks; (iii) the necessity for public tasks performed to realize the

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[6] B. Dolnicki - *The Public Law Agreement – Selected Issues* [in:] *An Individual in a Democratic Rule of Law,* ed. J. Filipek, Bielsko-Biała 2003, pp. 171-172

[7] e. g. Art.8 Par. 2 and 2a and 74 of the Act of 8 March 1990 on Commune Self Government (J. o. L. 2001, no. 142, item 1591 as amended); Art. 5,73 and 74 of the Act of 5 June 1998 on District Self Government (J. o. L., no. 91, item 578 as am.); Art. 8 Par. 2, 3 and 4 of Act of 5 June 1998 on Province Self Government (J. o. L. 2001, no. 142, item 1590, as am.).

[8] M. Jaśkowska, A. Wróbel – Comment on Art. 1 of KPA (Code of Administrative Proceedings, Kodeks Postępowania Administracyjnego)

[9] A broad analysis can be found in: M. Ofiarska – Agreement as a Form of Administration Activity in Selected Legal Systems [in:] *Administrative Science in the Face of Challenges in Contemporary Rule of Law,* ed. TNOiK Rzeszów-Cisna 2002

[10] Stipulated in Art. 25 of the Act of 12 March 2004 on Social Welfare (J. o. L. of 2009, no. 175, item 1362, as am.)

[11] Provided for in the Act of 27 August 2004 on admission to health treatment funded from public resources (J. o. L. of 2008, no. 164, item 1027, as am.).

[12] A. Panasiuk - *Public* Law *Agreement. An Attempt of Definition.* PiP 2/2008, p. 39

public interest; (iv) freedom of contract; (v) a clear division between the duties of the parties; (vi) definition of liability rules for the performance of the contract and its result; (vii) definition of principles that supervise the manner in which public tasks are performed.[13]

A regulatory agreement seems to be an institution approximate to an administrative agreement. In contrast to an administrative agreement, the commitment of the authority to a defined conduct is implicit in the agreement, including taking specific actions based on decision-making power (e. g. issuing a decision). The content of an agreement should be the result of consent between both parties, which brings them closer to an administrative settlement. The unquestionable advantage of an agreement is the possibility of defining the duties of the regulated undertaking, also including duties which may be of importance for the market, and which the regulator is not authorized to specify on the basis of substantive rules.

The regulated entity would perform activities in the public interest, in a manner defined by the regulator, gaining in return stability and predictability of the market environment. Enabling the market regulator and the regulated entities to conclude agreements would improve regulation and it would mean implementing the principle of subsidiarity and increasing citizens' trust in the state.[14] Irrespective of any advantages or an immediate need to introduce a regulatory agreement into the Polish legal order, one should agree with the assessment of D. Kijowski that a detailed regulation of principles is necessary in making regulatory or public agreements within the national legal order, both from the procedural point of view and to ensure correct supervision of the performance of the agreement.[15]

Regulatory agreement in Telecommunications Law

Since 2006, the regulator of the telecommunications market, the President of the Office of Electronic Communications (OEC), addressed a number of administrative decisions to the Polish incumbent in the telecommunications market, Telekomunikacja Polska S.A. (TP). These

[13] Ibid.

[14] J. Zimmermann – *Administrative Law,* Cracow 2005, pp. 405-406 (in relation to administrative agreement)

[15] D. Kijowski – Issues of Legal Regulation in Applying Alternative Forms Toward an Administrative Act [in:] *Concept of Administrative Legal System. Congress of Professorships of Administrative Law and Administrative Proceedings,* ed. J. Zimmermann, Warsaw-Cracow 2007

decisions were aimed at improving conditions for the operation of independent undertakings (alternative operators), providing services that used the infrastructure of TP in the fixed-voice telephony market, broadband connectivity (including broadband data service), and lease of telecommunication circuits.

Decisions taken by the President of the OEC related to the analysis of the relevant market, appointing TP as the leading undertaking with a considerable market position, imposing regulatory obligations on TP, approving framework offers (*oferty ramowe*), and settling interconnection disputes between TP and other relevant market players. Despite a number of actions taken by the President of the OEC, the report titled *Analysis of functional separation of TP S. A.* and commissioned by the President of the OEC[16] pointed out that TP takes obstructive action against alternative operators which would like to use the full wholesale offer, which consequently hinders effective competition from these undertakings with TP in the retail market.

The anti-competitive attitude of TP was indicated as a significant barrier to market development. In relation to the presented factual examination, the President of the OEC was considering the legitimacy of a functional demerger of TP into separate wholesale and retail part. Despite the initiation of proceedings on that matter, the demerger did not take place. The Presidents of the OEC and TP decided instead to sign a regulatory agreement, which it was assumed would improve conditions for alternative operations. In principle this agreement was projected to be a less complicated solution from the legal point of view, from the perspective of organizational changes, including IT systems, and its implementation was less time-consuming and required less financial outlay. It must be noticed that in 2009 the Telecommunications Law (TL)[17] did not provide for such a regulatory instrument.

The regulatory agreement "*On implementation of transparency principles and non-discrimination in relations between operators*" was signed between TP and the President of the OEC on the 22nd of October 2009. According to the Agreement, TP undertook, among other things, to:

1. fulfill correctly all TP's regulatory obligations in the relevant markets;
2. conclude contracts with alternative operators in accordance with the specifications of the Agreement;

[16] Published on 26 November 2008 and available at www.uke.gov.pl

[17] Act of 16 July 2004, Telecommunications Law, Journal of Laws, no. 171, item 1800, as amended.

3. apply the principle of non-discrimination defined in the Agreement;
4. complete legal and administrative proceedings indicated in the Agreement;
5. create an infrastructure of fixed broadband access enabling at least 1,200,000 new broadband connections;
6. take measures aimed at strengthening the identification of employees with parts of TP represented by them.

It should be pointed out here that besides the issues related strictly to the regulatory agreement, TP's investment liabilities were also included in the agreement. The President of the OEC would not have been able to compel the entrepreneur to take actions towards this development, and undoubtedly extending access of a large group of consumers to broadband internet allowed the achievement of a vital objective from the point of view of the public interest. The next action, without which implementation would not otherwise have been possible, was the withdrawal of legal measures which TP had filed in the courts against the decisions of the President of the OEC. A number of legal proceedings were conducted as an element of TP's strategy against new players entering the market. Resigning from judicial proceedings enabled in many cases the settlement of long-standing disputes. It allowed both the regulator and TP to concentrate on fulfilling their tasks and achieving their business aims.

In the agreement, there is only one obligation on the part of the President of the OEC to be found, namely to "freeze" prices of wholesale services for the period of three years, i. e. until the end of 2012 (with some possible derogations). Thereby, TP raised funds for the implementation of planned investments and guaranteed itself a steady income from alternative operators. It is open to discussion whether the President of the OEC should undertake to hold down the wholesale rates for such a long period, in the light of Art. 43 Par. 2 TL, pursuant to which:

> "in the event of changing demand for services or a change of market conditions the President of OEC may ex officio or upon the justified motion of the telecommunications enterprise oblige the operator to prepare a partial or a total change in the framework offer within a certain time frame. In the event of lack of presentation of a change in framework offer by the obliged operator on the relevant date, the President of OEC individually sets the change of the Framework offer in total or in part."

The question of how the administrative authority would have reacted if a significant change of market conditions had occurred at that time remains unanswered.

The regulatory agreement is considered a great success and the debate on prolonging it or entering a new agreement continues.[18] It is emphasized that without the agreement many beneficial changes on the wholesale and retail market would not have taken place. The agreement changed the market, which ceased to focus on disputes and started concentrating on investments and creating competitive service offers. As it has been pointed out by the President of the OEC: "*the agreement changed also the mentality of the incumbent*."[19]

Based on the experience gained as a result of an amendment of TL[20], the possibility of approval by the President of the OEC concerning a detailed manner of the performance of regulatory duties by the telecommunications company with a significant market position was formally introduced. According to Art. 43a Par. 1 TL, the President of the OEC can approve by way of a decision, upon the motion of a telecommunications enterprise holding a significant market position, detailed conditions in the performance of regulatory duties that were previously imposed on the telecommunications undertaking, and other obligations of the telecommunications undertaking. This may contribute to the efficient enforcement of regulatory obligations imposed on the telecommunications undertaking, the development of equal and efficient competition, extension and use of modern telecommunications infrastructure, or providing maximum benefits to consumers as regards diversity, price and quality of telecommunications services. These are hereinafter referred to as "detailed regulatory conditions".

Proposals for detailed regulatory conditions included in the telecommunications entrepreneur's application may be defined subject to conditions or dates. Art. 43a also stipulates a detailed code of conduct concerning a request to gain approval of duties. It has been indicated in the doctrine that within the framework of this procedure, imposition, abolition or change in regulatory duties should not take place – they should only be elaborated.[21]

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[18] "*The Market Demands a Flexible Regulatory Policy*", Rzeczpospolita, 2 February 2012.
[19] "*Prolongation of an Agreement to Take into Consideration*", Rzeczpospolita, 7 September 2011.
[20] Act of 29 October 2010 on the amendment of the Telecommunications Act (J. o. L., no. 229 item 1499).
[21] M. Rogalski, Telecommunications Act. eLEX 2011.

Pursuant to the reasons of the Bill,[22] the legislator raised the issue that the regulatory authority should have the possibility of applying a measure, which – based on the voluntary commitments of the telecommunications undertaking with a significant market position – enables the expectations concerning results to be comparable with regulatory activities that are based on decision-making power. The necessity of formulating duties in a flexible way, comparable to civil law agreement, has been also emphasized.

The premise of the regulatory tool implemented in Art. 43a TL is that detailed regulatory conditions are from start to finish a result of consent between the regulated enterprise and the President of the OEC. The initiative within the framework of defining these conditions lies with the telecommunications undertaking with a significant market position, on which the regulatory duties within the scope of telecommunications access have been imposed.

Pursuant to the Art. 43a Par. 4 TL, the President of the OEC may approve detailed regulatory conditions included in the motion of the telecommunications undertaking, if they are consistent with the provisions of the law, with the regulatory obligations imposed on the telecommunications company, and with the needs of the telecommunications market, and provided they will enable an efficient enforcement of regulatory obligations imposed on the telecommunications company, the development of equal and efficient competition, the extension and use of modern telecommunications infrastructure, or providing maximum benefits for consumers as regards diversity, price and quality of telecommunications services.

On the basis of Art. 43a TL, the President of the OEC issued among other things a decision concerning a regulatory obligation on Polska Telefonia Cyfrowa Sp. z o.o. (PCT), related to the assurance of completing the coverage of areas of so-called "white space" and areas with low population density with telecommunications networks. Within the framework of elaborating the regulatory obligation, PCT undertook to cover with telecommunications networks in particular those areas where telecommunications network coverage is unjustified from the economic point of view.

[22] Parliamentary Printed Matter no.2500 of the MPs' Bill on Amendment to the Telecommunications Act.

Regulatory agreement – remarks on the draft Energy Law

The draft of the Energy Law (DEL)[23] introduces into the legal order a new institution and at the same time a regulatory tool for the President of the Energy Regulatory Office (the President of the ERO) in the form of a so-called regulatory agreement. In the agreement, the energy grid operator undertakes to carry out investment projects which aim at performance of duties by the operator in accordance with its statutory obligations (specified in Art 82 and 83 DEL), in particular consisting of the implementation of new technological solutions or modernization of existing solutions.

For the President of the ERO, according to the project, the agreement obliges the authority to include in justified costs of the operator's business, costs resulting from carrying out investment projects. Thereby, the President of the ERO is obliged to recognize the costs of implementing investment projects in the tariff submitted by the transmission system operator (TSO) or the distribution system operator (DSO), which are already verified at the stage of setting up the agreement (Art 180 Par. 5 DEL).

The regulatory agreement is supposed to determine in particular:

1. the aim of the investment project,
2. its time schedule,
3. rules of responsibility of the parties in the case of failure in duties resulting from the regulatory agreement, and
4. principles of control of the investment project and its effects with reference to the intended purpose.

The introduction of the regulatory agreement aims to support essential infrastructure investments by means of guarantees that the costs incurred by the TSO or DSO for carrying out an investment project as part of the agreement will be recognized by the regulator as eligible costs in the approval process of the entrepreneur's tariff, and consequently, they will enable the entrepreneur to cover investment expenses from the regulated income. The authority will thereby provide stable conditions of investment funding, which will play a crucial role during the credit assessment of the grid operator. Moreover, the agreement will have a positive impact both on the increase in availability of debt-financing for companies, and on the level of debt-financing costs relating to the implementation of an

[23] Presented on 22 December 2011.

investment project. Consequently, it will provide the means for carrying out investment and its long-term financing. The regulatory agreement can be concluded by the President of the ERO with the TSO or DSO on an equal treatment basis (Art 156 DEL).

The agreement is bound to be concluded for carrying out infrastructure projects, the implementation of which will raise the efficiency of the operator tasks to be performed by the TSO or DSO. Specific investment objectives, however, are specified in the agreement itself. The question arises as to whether such modestly drawn premises, determining the investments to be covered by the agreement, are sufficient?

Definitely not, since they are identical with statutory operators' obligations that are performed within the framework of the concession, including duties that concern the construction and extension of the grid, ensuring the safe functioning of the electricity system and an adequate transmission capacity into the transmission grids. Thus, there is a lack of clear guidance for applicants as to which investments may be granted the privilege of a special treatment, and which will be carried out without being secured by a financing agreement. The efficiency criterion is taken *ex lege* when appointing the undertaking to the energy system operator (Art 72 DEL).

Another statutory obligation of the operators is effective grid management, providing long-term transmission capacity of the energy system and funding and extending the grid. Guidelines determining the actions to be taken in the first instance by the operators, i.e. actions necessary in order to secure the safety of the continuous supply of electrical power, protection of consumers' interests, and environmental protection, are defined in the Art. 150 Par 150 DEL.

Under the Draft it is difficult to indicate which investments are relevant enough to be covered by the regulatory agreement. Therefore the legislator should widen the scope of the agreement, and clearly define the premises of concluding it, as well as the choice of investments thereunder. Otherwise, the agreement will become a tool for granting priority status on the part of the TSO or DSO and the President of the ERO to particular investments, e. g. in view of issues concerning security of energy supply, improvement of conditions of competition, or improvement of conditions of exchange within interconnections.

The President of the ERO, in approving the administrative agreement, should therefore indicate the public interest premises by which it was guided, while selecting and guaranteeing the financing of a given project. This was underlined when the President of ERO, while proposing in his public statements the introduction of a regulatory agreement into the

Polish legal order (in the context of a possible agreement with DSO concerning investments in intelligent metering), rightly pointed out that the agreement institution is designed for achieving public purposes.[24]

There are other areas in the DEL which should be specified. In the first place, there is a lack of detailed information on the principles of conducting proceedings, and the form in which the administrative agreement will be concluded and its legal effects. Certain guidelines concerning the intentions of the legislator, and possibly introduced at the stage of further legal developments, are available at the reasons of the DEL.

Pursuant to the reasons of the Draft, the regulatory agreement is not a civil law agreement. In the case of a civil law agreement we would deal with a principle of equivalence of the parties (*zasada równości stron*); the will of the parties and their statements would be assessed in a manner based on the Civil Code, while possible legal disputes resulting from the agreement would be settled by a civil court. Admittedly, there is a legacy in the Draft on the principle of equal treatment; it seems though that it cannot be interpreted as a litigation balance *(równowaga procesowa)* between the President of the ERO and the operator, but rather as a directive on the equal treatment of duties accepted by the operator and in accordance with them, the duty of an authority to recognize as justified costs the costs of the investment process.

As for the regulatory agreement, an essential piece of guidance is the record of the legacy, which states that the regulatory agreement from the perspective of the authority's competence should be treated as a unique public pledge (*przyrzeczenie publiczne*). This means in practice that we deal with a *quasi* agreement and not the unilateral stand of an authority.

It seems to have been assumed that during the administrative proceeding, initiated upon the motion of the system operator, the President of the ERO and the promoter agree on the aim of an investment project, its schedule, the improvement of the DSO's or TSO's efficiency, as well as necessary measures for the operator in order to carry out the investment. At the stage of drawing up the content of the agreement, the President of the ERO will have the possibility of addressing requests to operators concerning the presentation of information on the investment project, as well as, according to the current practice, the possibility of calling working meetings with the applicant or holding an enquiry with other market players.

[24] Ireneusz Chojnacki – ERO proposes a regulatory agreement related to intelligent measurement– wnp.pl, 3 September 2009 / accessed on 20 February 2012/

What if the regulatory agreement consists of an investment covered by the grid development plan or one which is to be covered by it before the conclusion of the regulatory agreement? Then it will be necessary to deal with it in the process of enquiry with present or potential system users or their organizations, in the mode stated in Art. 153 DEL. Next, already in the framework of the regulatory agreement, the DSO or TSO undertakes to carry out such an investment and the President of the ERO "promises" its funding. Such a written statement of the authority, obliging itself to a specific action towards the party of the agreement, will give rise to legal consequences resulting from the principle of trust of citizens in authorities of the state (Art. 8 KPA). The President of the ERO will fulfill his promise through his approval, by way of a decision, of the submitted tariff application, recognizing the costs of the investment project (Art. 190 DEL) and, if necessary, the approval – also by way of a decision – of the development plan or its change (Art. 153 DEL).

Should such a structure of conducting proceeding be adopted, the operator and the President of the ERO will have to achieve consensus regarding the content of the agreement, in particular in relation to the investment subject, its time schedule and costs. As long as the mechanism form implementing the regulatory agreement from the perspective of the proceeding and the administrative decision is enforceable on the grounds of present and proposed regulations, it is the execution principles of such an agreement by its parties that raise doubts. The agreement is bound to define the rules on the parties' liability in the event of non-performance of the obligations, nevertheless they will not be defined as civil remedies, e.g. a contractual penalty.

Pursuant to the reasons of the Bill, the liability of the undertaking may consist of not recognizing non-incurred investment expenditures as justified costs in the tariff. This sanction is not clear, because the lack of capital outlay takes direct effect in the lack of increase in the regulatory value of assets, which influences the tariff.

What is the alternative? The agreement is meant to enable stable investment financing, thus an effective remedy for non-performance of the investment would be the removal of the guarantees by which the investment expenditures are recognized as justified costs specified in the agreement, and a repeated verification under relevant laws and regulations. Here also there is a lack of clarity as to how the President of ERO should act if delays in the implementation of the investment project arise from objective reasons, e.g. residents' protest against the investment.

Should the agreement be breached by the President of ERO, the undertaking, in accordance with the reasons of the Draft, will be entitled to

lodge an appeal with the anti-monopoly court. As the decision to appeal to the anti-monopoly court lies solely with the President of ERO (Art. 172 Par. 2 DEL), and the agreement will not be concluded, or confirmed in a dedicated decision of the President of ERO, it may mean that the only measure that the company will have at its disposal will be an appeal against the decision approving the tariff. Practice to date relating to the approval process of the tariffs by the President of ERO shows, however, that in practical terms lodging this measure will not be possible.

Why is this so? Because lodging an appeal requires the application of the existing tariff, which usually does guarantee an increased income. Another legal measure available to an energy company is a claim for damages, if such were caused by breach of contract by the President of the ERO, pursuant to Art. 417 of *CC* [*the Polish Civil Code*]. The above-mentioned situations clearly indicate that the Bill should be supported by clear guidance as to the way in which, with respect for the principle of trust of citizens in authorities, the agreement's execution is being enforced.

The doubts indicated above may be withdrawn in the course of the legislative process. Despite these reservations, the regulatory tool itself must be assessed positively, in virtue of the fact that it represents a qualitative change in the model of regulations to date, and because it introduces the consensuality principle instead of actions based strictly on decision-making power.

The inclusion by this institution of other undertakings active in the energy sector should also be considered. Pursuant to the Bill, the possibility of reaching an agreement with the President of the ERO exists only for DGO or TGO of electricity systems. It seems though that there are no obstacles related to making this tool accessible for information data operators (*operator informacji pomiarowych*), companies dealing with heat transfer, or other entities, including wholesalers. I can see at this point at least two possibilities:

1. In the case of infrastructure undertakings, which are now under stringent regulation and are obliged to act according to the approved instructions and compatibility programmes, the regulatory agreement could be used in addition, e.g. to stipulate access rules to the newly built infrastructure in the scope of the *open season* – procedure.
2. In case of wholesalers, the regulatory agreement could also encompass such issues as cooperation terms with consumers and other energy companies, activities in favour of consumers, or activities supporting implementation of new technologies.

The institution of a regulatory agreement should also be introduced in the gas sector.

Regulatory agreements as a gas release tool

Benefits of the Regulatory Agreement have been recognized by Polskie Górnictwo Naftowe i Gazownictwo (PGNiG), which proposed conducting a gas release programme (GRP) in the form of a regulatory agreement between the incumbent and the ERO President.[25] The GRP proposals were published for public consultation on 14 February 2012.

PGNiG is the largest Polish oil and gas exploration and production company. PGNiG is active in all of the natural gas market segments in Poland, which are trade, distribution, oil and gas exploration and production, as well as gas storage and processing. The company has a 98% share in the Polish gas market. The GRP has been prepared by PGNiG in connection with the *Roadmap for Gas Prices Release in Poland*, a document drafted by the ERO.[26] The Roadmap foresees that PGNiG will offer natural gas to the order of at least 70% of the national consumption on the commodity exchange. According to the ERO, PRG is a requirement for the release of gas prices for industrial and commercial customers. Importantly, the Roadmap assumes that PGNiG will conduct the GRP voluntarily. In Polish law, there is no provision on the basis of which the ERO President, or the President of the Office for Competition and Consumer Protection, could impose an obligation on any company to sell certain quantities of energy in order to make the market more liquid and to create competition in the market. It is worth remembering that in the case of electricity, all energy companies are obliged to sell 15% of their annual production on the energy exchange, but their obligation results from the provisions of the Energy Law. Before the introduction of these provisions, no one had discussed the possibility of introducing an electricity release programme based on voluntary commitments.

According to PGNIG, under the GRP it will release a total quantity of 9.4 billion cubic meters of natural gas per year, which corresponds to 70% of the market, in auctions set for 2013-2015. GRP auctions will be carried out according to rules that guarantee public and equal access for all interested parties. PGNiG will not participate in the GRP auctions as a buyer. Under the GRP, PGNiG will deliver gas to the Virtual Trading Point, situated in the transmission system of OGP Gaz-System.

The starting price of gas offered through the GRP auctions will be determined on the basis of the wholesale purchase price, taking into account costs of gas from all sources, including: cost of imported gas, cost

[25] Available at www.pgnig.pl (accessed on 15 March 2012).
[26] Available at www.ure.gov.pl (accessed on 15 March 2012).

of gas from domestic production, cost of maintenance of the mandatory stocks of gas, transportation fees and PGNiG's wholesale margin. PGNiG will introduce a discount to the wholesale price, which would constitute an incentive for potential participants in the GRP auctions. The level of the discount offered by PGNiG will be equal to the wholesale margin of the company. This way the competitors can beat the incumbent on the margin.

The concept of a GRP presupposes the conclusion of a Regulatory Agreement between PGNiG and the President of the ERO. The Agreement shall constitute a voluntary commitment of the parties to comply with rules set out therein, until 31st December, 2015. According to the company's proposition, the Regulatory Agreement shall precisely define the following issues: (i) the methodology for calculating the price of gas offered within the scope of the GRP; (ii) the method of indexation of prices of gas offered by PGNiG under the GRP until the end of the programme. Moreover, the GRP scheme assumes: (i) the release of gas by PGNiG through the GRP auctions at the price calculated in accordance with the method indicated in the Regulatory Agreement; (ii) a decision by the President of the ERO to discharge gas traders from the obligation to submit tariffs for approval with regard to the segment of institutional customers; (iii) maintaining the obligation to submit tariffs for approval with regard to the segment of household customers, but the base price for this tariff will be established by taking into account the wholesale price determined in accordance with the Regulatory Agreement. Despite the broad scope of the Agreement, there is still the necessity to change Polish law in order to remove legal obstacles to conducting the GRP. But these legal obstacles are at the level of regulations, which can be changed much more easily and quickly compared to Acts of Parliament. Some changes are also necessary in the gas network code and in the statute of the Energy Exchange.

The President of the ERO, on the basis of Art. 49 of the Energy Law, can discharge gas suppliers from the obligation to submit tariffs for approval with regard to the segment of institutional customers. While issuing this decision the President of the ERO shall consider such properties of the gas market as the number of market players and their shares of the market, the transparency of the structure and the terms of operation of the market, the existence of market access barriers, equal treatment of market participants, access to market information, the effectiveness of supervision and the measures of protection against the abuse of market position which limits competition, as well as the availability of high-efficiency technologies.

PGNiG underlines that lack of a conclusion of the Regulatory Agreement implementing the provisions of the draft GRP shall be deemed sufficient to justify PGNiG's withdrawal from the implementation of obligations undertaken by the Company under the GRP. It can be assumed that PGNiG will also withdraw the GRP in the case of a breach of the Agreement by the ERO.

According to the PGNiG, document the Regulatory Agreement shall constitute a bilateral commitment of the parties (the President of the ERO and PGNiG) to comply with the rules set out therein, within the period of implementation of the GRP. Provisions of the Regulatory Agreement shall be fully consistent with the stipulations of the detailed concept of GRP implementation, as prepared by PGNiG and consulted with gas market stakeholders. The company has not proposed any provision regarding the responsibilities of the ERO or PGNiG in the case of a breach of the agreement. Also, it is not clear to what extent the ERO President's obligation to release the gas price tarification will be envisaged by the Agreement. The Energy Law stipulates rigid and verifiable conditions for such a discharge, thus even the completion of the GRP does not guarantee that the abovementioned conditions will be fulfilled.

Conclusion

The case presented of the regulatory agreement concluded between TP and the President of the OEC is an excellent example of the fact that the conclusion of a regulatory agreement is an effective way of solving problems of regulated markets. The amendment of the Act in the form of the Telecommunications Law, which introduced the approval of detailed regulatory conditions into the legal order, allows the interpretation that the legislator evaluated the results of the agreement positively. In addition, it seems possible and legitimate to introduce this institution in regulated sectors other than telecommunications, for example the Bill of Energy Law prepared by the Ministry of Economy, and the GRP-project presented by PGNiG.

Which benefits will arise from the introduction of regulatory agreements into the Acts that regulate these sectors?

The fact that the agreement would define the operational framework of the regulated undertaking for a long-term period is not to be underestimated. This should increase legal stability and reduce administrative burdens. There is an increase in certainty, both of the regulator and the energy