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The Energy Tariff System and Development of Competition in the Scope of Polish Energy Law

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Abstract

This article presents problems associated with the development of competition on the Polish energy market in the context of tariffs and pricing. National standards are set against the background of European legislation and the activities of the Energy Regulatory Office. The thesis is that the tariffs concerning distribution should be approved by the President of this authority because it is a natural monopoly, something the authors demonstrate in the following part of the article. However, the tariffs concerning selling should be free from confirmation even for households because this is a typical market. The authors do not ignore legal analysis and practical issues.

Résumé

Cet article présente les problèmes associés avec le développement de la concurrence dans le marché de l'énergie en Pologne, dans le contexte des tarifs et des prix. Les standards nationaux sont présentés dans le contexte de la législation européenne

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et des activités de l'autorité de régulation de l'énergie (ERA). La thèse est que les tarifs concernant la distribution devront être acceptés par le Président de l'ERA, parce que c'est un monopole naturel, ce qui sera expliqué par les auteurs dans la partie suivante de l'article, mais les tarifs concernant la vente devront être libre, même pour les ménages, parce que c'est un marché typique. Les auteurs n'ignorent pas l'analyse de la loi et les aspects pratiques.

Classifications and key words: energy law, tariff, energy market.

I. Introduction

The purpose of the article is to present the influence of tariff-setting on the energy market in light of national and community judicial judgements. The authors have not made an economic analysis, and only within the limited extent of this article consider the influence of instruments of an administrative character in the form of tariff approval on the development of competition on the energy market.

Many directives issued within the structure of the European Union (EU) are connected with the liberalization of the energy market. This obviously has a direct effect on national legislation. Energy companies operating on the market aim to maximize their revenues, but they are restricted in doing so by state institutions and legislation. The literature distinguishes various types of regulations and differing motives for its introduction. One may mention regulation for economic reasons concerning the control of prices, the conditions for entry and exit from the sector, type of products, etc. – or regulation connected with social welfare, undertaken in the form of safety, quality, environmental protection, and consumer protection requirements, etc. Among the motives justifying regulation we may mention market inadequacies (ineffectiveness) related to external effects on product markets and production factors, the problem of private and public assets, the problem of natural monopolies, the requirement of supplying ordinary services at sensible prices, and political maneuvering in the conditions of public choice. The process of regulation is used by the state for achieving various functions, such as creating a legal basis for the operation of the market economy. From the times of Adam Smith, the problem of determining the compass of state regulation has been a focus of expert debate¹ as well as legislative efforts. In the scope

¹ A. Zielińska-Głębocka, *Podstawowe założenia teorii konkurencji* [in:] *Konkurencja*, Z. Brodecki [ed.], LexisNexis, Warszawa 2004, pp. 48–49.

of the electricity and natural gas directives², energy companies have been subject to regulation through *unbundling* – in other words, separation of the transmission and distribution activities of a network business from its activities in production and supply.

The main idea of unbundling was to mitigate the incentives for discriminating against competitors, and to increase equality in access to the market and competition. Among others matters, the assumption of the electricity and market directives was also the elimination of discrimination both in the area of defining electricity and gas prices in tariffs³, which shall guarantee nondiscriminatory access to the energy system for all users.

There are two different types of tariffs: (i) distribution tariffs – fee for the energy transfer and (ii) end-user tariffs – currently only for households. Tariffs concerning distribution and transmission should be approved by the President of the Energy Regulatory Office (*Urząd Regulacji Energetyki*; hereafter, URE) because it is a natural monopoly, as we prove in the following part of this article. However, the tariffs concerning price cap for households should be free from the obligation of receiving an approval granted by the URE President. In conclusion, it is our opinion that excessive state interference in the regulation of prices for selling energy and in distribution does not provide improved protection for consumers in the long term.

II. The tariff issue in Poland: a general depiction

In connection with the interference of the state in the energy market the concept of the tariff was introduced to the Act of 10 April 1997 – the Energy Law (hereafter, the Energy Law)⁴. According to Article 3 item 17 of the Energy Law, a tariff is the collection of prices and fee rates, as well as

² Directive of the European Parliament and of the Council 2009/72/EC of 13 July 2009 concerning common rules for the internal market in energy and repealing Directive 2003/54/EC, OJ (2009) L 211/55; Directive of the European Parliament and of the Council 2009/73/EC of 13 July 2009 concerning common rules for the internal natural gas and repealing Directive 2003/55/EC, OJ [2009] L 211/94; Directive 2003/54/WE of the European Parliament and of the Council of the 26 July 2003 concerning common principles in the internal electric energy market and revoking directive 96/92/WE (OJ [2003] L 176/37); Directive 2003/55/WE of the European Parliament and of the Council of the 26 July 2003 concerning common principles in the internal natural gas market and revoking directive 98/30/WE (OJ [2003] L 176/57).

³ B. Nowak, *Wewnętrzny rynek energii w Unii Europejskiej*, C.H. Beck, Warszawa 2009, p. 123 ff.

⁴ Unified text available at http://www.ure.gov.pl/portals/pl/25/17/Ustawa_z_dnia_10_kwietnia_1997_r_Prawo_energetyczne.html.

the conditions of their application, drawn up by the energy enterprise and introduced, as being in force for the recipients specified in them in the manner specified in the Act, that is in the form of administrative decision. These are tariffs which are approved by the URE President, although some of them may not be approved under the provisions of the Energy Law. It is necessary to agree with the position of H. Palarz⁵, that fees are treated in the literature as a public rent collected from subjects in connection with mutual provisions on behalf of those subjects, assuming the form of public services, pursued in principle by enforcement. In the Energy Law the concept of fees is used in another meaning than public legal rents and applies to some of the price components of an energy enterprise. Obviously the question arises as to the legal nature of the establishment of prices. Furthermore, according to the ruling of the Supreme Court of April 11, 2003⁶ the tariff of fuels corresponds to the requirements specified in Article 47 item 1 of the Energy Law and is classified in a standardized contract.⁷ This means that the text of the tariff (with any specific obligations or possibilities) should be an integral part of any agreement.

III. The regulator's role in energy tariff regulation

In our opinion the activity of the URE President, as a substitute for a competitive market, should be obligatory, especially in markets where a natural monopoly exists, such as the energy market. However even here a demarcation line shall be drawn between transmission and distribution which require regulation and supply of energy to customers, and which shall be left to market forces of demand and supply. Otherwise destabilization of the market might ensue.

As confirmed by the URE President in his Statement of June 28, 2001 'The general relief from the duty to approve a tariff issued on electricity generation and electricity trading companies with no electricity distribution activity' ('Statement of June 28, 2001')⁸ was legally effective. Pursuant to

⁵ H. Palarz, *Prawo energetyczne z komentarzem*, Gdańsk 2004, p. 33.

⁶ V CK 38/2002.

⁷ This position was confirmed by the Supreme Court in the ruling of the Civil Division of the Supreme Court that the tariff, approved by the Energy Regulation Authority is not an administrative act, it is within the application of Article 384 of the Polish Civil Code, which does not contain a closed catalogue and is a standard V CK 855/2004 (*Gazeta Prawna* 2005/134 p. 17).

⁸ Stanowisko Prezesa URE w sprawie zwolnienia przedsiębiorstw energetycznych zajmujących się wytwarzaniem i obrotem energią elektryczną z obowiązku przedkładania taryf do zatwierdzenia (28.06.2001), www.ure.gov.pl.

Article 49 item 1 of the Energy Law the URE President is empowered to grant a relief from the duty to submit tariffs, if the market where a particular energy enterprise operates is competitive. The URE President is also empowered to withdraw its relief from the tariff approval duty, provided that the reasons for the earlier issued relief no longer exist. What this means is that that today's energy market cannot be less competitive than in 2001.

It must be noted that pursuant to Article 47 item 1 of the Energy Law the URE President approves tariff (tariff application) submitted by the energy undertaking, but he is not allowed to define the content of the application. The tariff approval procedure includes only two possible outcomes: a decision approving tariff or a decision refusing to approve tariff.

According to Article 47 item 1 of the Energy Law tariffs for natural gas and electric power are subject to approval by the URE President. Energy enterprises prepare tariff application themselves or at the demand of the URE President. Failure to submit an application in the event of a summons by the URE President is subject to a penalty in the procedure of Article 56 item 1 point 5a of the Energy Law. Furthermore according to the judgement of the Supreme Administrative Court (*Naczelny Sąd Administracyjny*; hereafter, NSA) of March 31, 2009⁹ such summons of an energy enterprise to submit tariffs, made by the URE President, is not an act or action within the scope of public administration concerning authorizations or obligations arising from legal regulations and thus is not subject to appeal.

In the tariff application the energy enterprise proposes the period for which the tariff shall be in force. Indication of the validity period of the tariff by the energy enterprise (the applicant) in our opinion should not exceed three years. In the Energy Law the legislator accepted the principle that the period in force not exceeding three years should be dependent upon fulfillment of the premise defined in this regulation. The URE President is authorized to demand changes to tariffs and to the premises (reasons and conditions) applied in the application, e.g., in a situation where a new tariff might lead to the reduction of rates of prices and fees. Undoubtedly the fact remains, as confirmed by the Supreme Court in its judgment of August 5, 2004¹⁰, that the obligation of an energy enterprise to submit to the procedure of tariff verification on the basis of Article 47 of the Energy Law is an obligation of a public-legal nature obliging it to apply prices according to approved tariffs.

The URE President confirms a tariff or refuses its approval in the event that it does not fulfill the requirements as specified in the regulations of the Energy Law. Proceedings in the case of approval of tariffs are subject to the general principles defined in the Code of Administrative Procedure (*Kodeks*

⁹ II GSK 831/08.

¹⁰ III CK 349/03.

Postępowania Administracyjnego; hereafter, CAP), meaning that procedures in such matters should be completed within the period envisaged for arranging matters by the provisions of this Act¹¹. This is explicitly indicated in Article 30 item 1¹² of the Energy Law, which in proceedings conducted before the URE President that orders the application of the provisions of CAP¹³. The URE President in the process of the proceedings for approving tariffs makes an assessment of whether the given tariff has been established in accord with the legal regulations. The boundaries of interference of the Authority in this extent are defined by the provisions of Article 23 item 2 point 2 and 3 in conjunction with Article 47 and 49 of the Energy Law in conjunction with the issues executive ordinances based on Article 46.

According to Article 47 item 2a of the Energy Law the URE President, on the application of energy enterprises, can approve for a period not exceeding 3 years, a tariff containing prices and fee rates whose amount shall not exceed prices and fee rates in force prior to its submission to the URE President, if the following combined conditions are fulfilled, i.e.:

- 1) tariff conditions of application of prices and fee rates have not been subject to change;
- 2) documented (and described in the application) external changes of conditions to the business activity of the energy enterprise, and which concern the tariff, do not justify the reduction of prices and fee rates contained in the tariff;

¹¹ Not completing procedures in one of the periods, referred to in Article 35 of CAP or lack of notification directed to parties according to art. 36 § 1, may result in the resorting by one party to legal measures to combat the inertia of a public authority, including a complaint about inactivity to the Provincial Administrative Court (Article 3 § 1 point 8 of the Act of 30 August 2002 – Law on Procedure before Administration Courts). (...) Additionally it would be necessary to consider, when the situation in which the tariff for various reasons would not be confirmed within the period envisaged in Article 35 CAP, might give rise to responsibility for damages of the party of the President of the Authority. Article 77 of the Constitution of the Republic of Poland states that everyone is entitled to compensation for damages inflicted by the action of a public administrative authority, which contravenes the law. This constitutional principle is codified in the regulations of Article 417–417² of the Act of the 23 April 1964 – Civil Code. According to the wording of Article 417¹ § 3, if damages are inflicted by the failure to issue a ruling or decision, if the obligation to issue them is envisaged in a legal regulation, its remedy may be demanded after confirmation in the appropriate procedure of lack of conformity with the law in the lack of issue of ruling or decision, unless separate regulations determine otherwise. In particular sites damages may arise in the situation, where a new tariff envisaged an increase in prices and fee rates and the President the Office would confirm it with delay....”. For more see: T. Dec, G. Słowiński, ‘Ile potrzeba czasu na zatwierdzenie taryfy?’ (2005) 6 *Biuletyn URE*.

¹² Journal of Laws of 2000 No. 98, item 1071 with amendments.

¹³ B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2005.

- 3) for the period proposed in the application of the validity of the tariff or part of this period a correction coefficient has not been established, defining the projected correction of the operating efficiency of the energy enterprise and changes in the conditions of the performance by the enterprise of a given type of commercial activity.

In this case two doubts arise: the first concerns the concept of prices and fee rates not exceeding amounts in force prior to the submission of tariffs to the URE President. One must therefore assume that these are prices from the last tariff approved by the URE President. It is obvious that all the premises to define are subject to evaluation by the URE President. According to Article 7 of CAP, during administrative proceedings the administrative authorities such as URE President are guardians of legality and take all steps essential to the precise clarification of facts and to the settlement of the case, which is equitable to the public interest. Before issuing a decision concerning the approval or refusal of a tariff the URE President is obliged to exhaustively collect and examine all material evidence (compare Article 77 § 1 CAP). In the event of documented changes of external conditions in the performance of commercial activity by an energy enterprise the URE President may issue a decision on the correction coefficient, defining the projected improvement in the efficiency of the operation of the energy enterprise and the changes in the conditions of the performance by the enterprise of the given type of commercial activity. This has been approved by the ruling of the Supreme Court of 14 January 2009¹⁴ according to which the decision of approval of electrical energy tariffs may be changed or revoked before the expiry of the period for which the tariff was established.

In such a case the energy enterprise is obliged to apply prices and fee rates from the tariff specified in Article 47 item 2a, until application of a new tariff. The previous tariff shall be applied in two instances, if:

- 1) the decision of the URE President has not been issued or
- 2) appeal proceedings are in progress against the decision of the URE President.

However, this tariff is not applied if the decision of the URE President refusing approval of the tariff is justified by the necessity of prices reduction and fee rates below the prices and fee rates contained in the hitherto binding tariff and results from documented and described changes in external conditions in the performance by the energy enterprise of commercial activity. In such a case the energy enterprise may not apply the tariff and equally may not apply a new tariff, because e.g., appeal proceedings are in progress. In

¹⁴ III SK 23/08.

such a situation the only solution appears to be to desist from the conduct of business activity by the energy enterprise.

According to Article 56 Para. 1 of the Energy Law, an entity which does not observe the obligation to present tariffs to the URE President for approval is subject to an administrative fine. The Supreme Court in its judgement of April 7, 2004¹⁵ approved this position stating that a financial penalty may also be imposed on a person who applies prices and tariffs not approved by the URE President, although already presented for such approval. This means that in such an instance, an energy enterprise may apply neither an unapproved tariff nor a tariff applicable to this time without being in jeopardy of a financial penalty. A possible solution in such a situation would be the legal regulation of such situations in agreements between the energy enterprise and the recipient¹⁶.

According to Article 47 of the Energy Law the URE President announces in the URE Bulletin, at the cost of the energy enterprise, the approved tariffs for fuel gases and electric power. The tariff may be in force not earlier than 14 and not later than 45 days from the date of its publication. This is not a rigidly defined *vacatio legis* of a new tariff, but the legislator has defined the time-frame for the inauguration of the new tariff. Obviously it is to the benefit of the recipients to acquaint themselves with the content of the new tariff. Nevertheless the parties, within the framework of mutual relations, are authorized to indicate another period for the inauguration of a tariff¹⁷. The aforementioned procedure concerns the approval of tariffs. It also raises the basic question of the role of the regulator in the extent of the possibility of non-execution of the obligation to approved tariffs.

The URE President is authorized to free an energy enterprise from the obligation to submit tariffs for approval, if he states that the energy enterprise operates in competitive conditions, on the basis of Article 49 item 1 of the Energy Law.¹⁸ The freeing referred to, may concern a specified part of the

¹⁵ III SK 30/04.

¹⁶ Compare with the judgement of the Supreme Court – Civil Division of October 2, 2003 (V CK 228/2002), which approved and announced in the procedure of the specified Energy Law, the tariff for energy in force from the expiry of the period defined in Article 47 item 4, unless the parties to the sale of energy agreement unless the parties of a power sales agreement defined the other terms of changes in prices and rates, or other means of settlement.

¹⁷ Compare judgement of the Supreme Court – Civil Division of October 2, 2003 (V CK 228/2002). See also: M. Czarnecka, T. Ogłódek *Prawo energetyczne. Komentarz*, C.H. Beck Warszawa 2009; R. Taradejna, Charakter prawny cen i stawek opłat zawartych w taryfie przedsiębiorstw energetycznych, (2003) 1 *Biuletyn URE* www.ure.gov.pl; R. Taradejna, A. Tutak, Problemy i pułapki administracyjno-prawnego zatwierdzenia taryf przedsiębiorstw energetycznych, (2005) 6 *Biuletyn URE* www.ure.gov.pl; D. Nowak, 'Ceny sztywne czy maksymalne?' (1999) 5 *Biuletyn URE*.

¹⁸ The quoted legal standard became the basis for the URE President's statement of December 14, 2000 on recognition of the electric power exchange market as a competitive market, thus releasing energy enterprises selling electric power through the market for goods from the obligation

operations conducted by the energy enterprise, in the extent to which such operations are conducted in a competitive market.¹⁹ With regard to the above, one may accept the interpretation that the release may apply to a specified type of business activity conducted by an energy enterprise and thus may refer to a specified group of tariff recipients or also apply to a specified geographical area. It is characteristic of the legislator to use the definition 'competitive conditions' instead of 'competitive market'. Use of this somewhat less rigorous clause gives the URE President greater possibilities in making use of this authorization.

It must be noted that the URE President still keeps to his stance pending the procedure of tariff approval. This will be actionable and can be challenged with an appeal in the Court for Protection of Competition and Consumers (*Sąd Ochrony Konkurencji i Konsumentów*; hereafter, CCP Court). The CCP Court could include an immediate enforcement clause. If the court judgment is not acceptable for the energy enterprise, it may appeal to the Court of Appeals in Warsaw and finally lodge a cassation procedure to the Supreme Court.

This situation means that provisions for unbundling should clearly indicate that access tariffs for distribution service accepted by the URE President as his domain shall be separated from price caps – tariffs set on prices charged to end-users (consumers). The latter shall remain subject to market conditions, and the role of the URE President shall be reduced to a minimum. Apart from this the division of tariffs set for particular group of consumers is significant – such as for households, small business, or large companies. It cannot be doubted that the intention of the URE President in the areas of natural

of application of tariffs. On the June 28, 2001 the President of the Authority issued the *Statement on release of energy undertaking generating and selling of electricity from the obligation to submit tariffs for confirmation* (Statement of June 18, 2001), on the basis of which he released energy enterprises undertaking production and distribution of electric power from the obligation to submit tariffs for confirmation (with the exception of associated power producers and energy enterprises simultaneously possessing concessions for electric power sale and sending or distributing electric power, that is distribution companies). On September 23, 2004 the URE President issued equally on the basis of Article 49 item 1 of Energy Law, an announcement on the strength of which he released energy enterprises undertaking associated energy production from the obligation of submission of tariffs from January 1, 2005 for electric power for confirmation recognizing that the producers of associated electric power operate in competitive circumstances. On October 31, 2007 the URE President issued the *Statement of URE President concerning the release of energy enterprises possessing a concession for the sale of electric power from the obligation of submission of tariffs for confirmation* (hereinafter, the Statement of 31 October 2007). With reference to the preceding statements, the Statement of 31 October 2007 constituted only the notification of release of all energy enterprises possessing concessions for the sale of electric power from the obligation of submission for confirmation of tariffs for electric power in the sale of electric power.

¹⁹ F. Elżanowski, *Polityka energetyczna. Prawne instrumenty realizacji*, LexisNexis, Warszawa 2008, p. 56 ff.

monopolies and network enterprises should be the restoration of market equilibrium through the prevention of the negative effects of a monopoly. The task performed by the URE President as a substitute for a competitive market shall be that of the requirement to achieve such a regulation of prices as would be established by the market in conditions excluding the existence of monopolies, simultaneously with regard to the principles of energy security and continuity of energy supply.²⁰ However, the natural monopoly in principle primarily concerns network enterprises.²¹

A natural monopoly exists when the supply of product or service is limited to only one enterprise. 'most frequently this exists in the sphere of public utilities, such as electricity supply, (...) It is stated by some that state interference in price-fixing leads to reduced economic efficiency. (...)'²² Whether the given business activity constitutes a natural monopoly depends on the combination of technical conditions, costs and consumer demands. It is generally accepted that the supply of electric power or natural gas by means of a network has the traits of a natural monopoly because the parties, apart from agreements of provision of distribution services, are permanently connected with each other by a permanent (most frequently capital intensive) connection.²³ As a result, the power of the URE President to accept tariffs is logical and required.

IV. Competition in the energy market and price regulation

In case of vertical integration where a competitive business of energy sale is integrated with a regulated business (distribution and transmission of energy) it would seem to be rational to maintain that those energy enterprises undertaking sales of electric power and natural gas should be released from the obligation of tariff approval. This is because this market, in keeping with the principle of third party access (TPA principle), is competitive and the buyer has the right to choose and change its supplier freely.

Generally, this position is supported by the URE President, who has issued the applicable announcements and positions releasing sales enterprises from

²⁰ E. Nojszewska, *Podstawy ekonomii*, Warszawa 1998, p. 134.

²¹ P. Bogusławski, *Taryfowanie ciepła – wymóg urzędniczy czy ekonomiczna konieczność?* (2008) 6 *Biuletyn URE*.

²² M. Nasiłowski, *System rynkowy. Podstawy mikro- i makroekonomii*, Warszawa 1998, p. 14.

²³ A. Dobroczyńska, L. Juchniewicz, *Konkurencyjny rynek energii – czy i komu jest potrzebny?* Biblioteka Regulatora www.ure.gov.pl.

the obligation of approval of tariffs²⁴. Third Part Access (TPA) is a concept which was presented in the Energy Act of 1992 in the United States with relation to the national grid. As a result, the law became the basis for the development of competition in the US wholesale electricity market, with the participation of utilities, manufacturers (with no long-term contracts), as well as new companies trading electricity. Of course, the introduction of TPA to the transmission network in the US did not involve an increase in charges for transmission services in these networks with an additional component in the form of stranded costs because it was associated with the opening of the electricity market for customers. Two representatives, though differing in the cases of the TPA to the distribution networks, are the United Kingdom and California. The difference between these cases are that in the UK the opening of the electricity market to customers was combined with privatization, whereas in California, it followed the opening in existing conditions in privately owned power companies.

As we have already mentioned, the URE President has stated his position in the case of recognizing the electric power exchange market as a competitive market, thus releasing energy enterprises selling electric power through the market for goods from the obligation of the approval of tariffs. On October 31, 2007, the URE President issued a new statement deciding that the market in Poland was sufficiently competitive. He later changed his opinion and took legal action against various energy enterprises to try and force them to gain the authority's approval of their tariffs. Of course all these decisions were issued in flagrant violation of Article 49 1 and 3 of the Energy Law because there was no inquiry on the cessation of the conditions justifying the exemption granted in the Statement of June 28, 2001. Under Article 110 of CAP, the URE President is bound by his Statement of 11 June 2007. However, the withdrawal of the exemption granted in the Statement, even if only partial, requires an analysis of the conditions that justified the amendment made by the Statement of June 28, 2001 and demonstration that those conditions ceased to exist later. No such analysis is a flagrant violation of Article 7, 8, 9, 11 and 77 of CAP. This raises the question about the legitimacy of such proceedings and the issue of the need to respect the principle of deepening trust. Indeed, the principle of explaining the merits of the conditions has been repeatedly the subject of attention both in literature and in the jurisprudence

²⁴ *Mapa drogowa uwolnienia cen dla wszystkich odbiorców energii elektrycznej. W drodze ku prawom odbiorców w sektorze energetycznym.* Document prepared by the URE President, 2008 (http://www.ure.gov.pl/ftp/Biuletyny_URE/2008/2008.03.03-biuletyn_nr2.pdf). See also Komunikat Prezesa URE z dnia 25 lutego 2008 r. w sprawie przesłanek uwolnienia cen energii elektrycznej dla odbiorców w gospodarstwach domowych (http://www.ure.gov.pl/portal/pdb/497/3032/Komunikatw_sprawie_przeslanek_uwolnienia_cen_energii_elektrycznej_dla_odbiorcow_.html).

of administrative law. Implementing the principles of persuasion – in the administrative procedure – should take place through the institution of CAP. ‘This principle should permeate through all activities of the administration in the course of the entire proceedings and the reasons in reaching a decision. Reasons for the decision, written in a proper manner, should be included so that the party can comprehend and if possible to accept the validity of the factual and legal grounds, which led to the authority in dealing with the case issuing a decision’²⁵.

This has a variety of impacts, for example, it should convince all parties that officials dealt fairly with the matter and that no decision was taken in an arbitrary manner, but only after considering all the circumstances. It also serves to show the decision-making mechanism, a description of actions taken and determines the motives of the government. At the same time, reasoning shows that the settlement is fair and beneficial, even if it has been unsuccessful, and that the party should be interested in the voluntary implementation of the imposed obligations.

One of the most important barriers to the development of competition in the market is a lack of proper separation of competitive activities from regulated activities in energy companies. In support of his decisions the URE President raised the problem of the lack of preparation for the actual implementation of the opening of the energy market to the public through free choice of energy supplier granted under Article 4j of the Energy Law,. In fact, the blame for this state of affairs should be laid at the URE President’s door, who by law is required to promote competition (Article 21 of the Energy Law). There is currently no clear information as to the state of the market for participants, neither is there any information regarding the ‘level of readiness of consumers’. Today the market means some kind of agreement between sellers and buyers, in which the supply by sellers, and demand of buyers is the price. The conditions of perfect competition in economic terms are a theoretical model of market and competition, which include assumptions that none of the market participants (consumers, companies, etc.) are able to influence the market price. This state can be achieved when certain important conditions are met, such as a large number of relatively small market participants, excellent portability factor, and full transparency of the market. This is something that economists would call ‘pure and perfect competition, namely, when the set of following four conditions are met by the market: atomization, uniformity, transparency, and liquidity.

²⁵ E. Ochendowski *Postępowania administracyjne i postępowanie przed sądem administracyjnym*, Wyd. Comer, Toruń 1995, p. 58.

However, because of the insufficient preparation of buyers (consumers) and their level of awareness of their rights, as so often indicated by the URE, there is no economic theory relevant for assessing the competitiveness of the market.

It is worth mentioning that the issue of prices, which are set below the cost of purchasing power, has already been noted in foreign literature. Experts have recognized the danger in such tariff regulation stating that if the prices are regulated below-cost this will eventually lead to a situation in which potential competitors are not interested in entering the market – which means that energy companies will not have equal access to customers²⁶.

The European Commission also shares the opinion that the Polish market is not yet free and that there have been infringements of EC law. A memorandum from June 25, 2009²⁷ states that: (i) the regulated end-user price should be the exception and not the principle of a competitive market, (ii) price regulation may lead to the inhibition of the development of the electricity market, (iii) The regulated prices are justified by public service obligations (see the memo regarding the European Commission's allegations against Greece, Lithuania, and Romania). However disputes continuously endure as to whether the obligation of tariff approval for recipients receiving electric power and natural gas for private domestic needs is necessary.

V. Conclusions

In most European countries there are still questions regarding end-user price regulation and whether there has been progress made towards fully deregulated markets. Price regulation is one indicator for market analysis, but of course there are many other relevant indicators which should be taken into account to obtain a complete full.²⁸ As of the January 1, 2010, regulated end-user prices still exist in quite a large proportion of countries in the electricity and natural gas market segments. Between 2008 and 2010, little progress regarding end-user price regulation removal can be seen in the various market

²⁶ C.W. Jones *EU Energy Law, The Internal Energy Market*, Vol 1, Second Edition, Claeys & Casteels, Leuven, 2004, p. 239.

²⁷ MEMO/09/296.

²⁸ ERGEG Draft GGP on indicators for retail market monitoring. Ref: E09-RMF-14-04, 16 April 2010 http://www.energyregulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/OPEN%20PUBLIC%20CONSULTATIONS/GGP%20retail%20market%20monitoring/CD/E09-RMF-14-04_Draft%20GGP-IRMM_PC_16-Apr-10.pdf Status review of End-User Price Regulation as of 1 January 2010.

segments. The small improvements noticed mainly concern the medium to large businesses segment and the energy intensive industry segment.

In most of the countries with end-user regulated prices, the proportion of eligible customers supplied at regulated prices is more than 80%, for each segment considered, indicating a lack of competition in the retail market. This share is close to 100% for the domestic segment. This figure is often smaller for larger customers. The reasons why customers do not switch from regulated prices to free market prices, e.g., lack of competitive offers, lower regulated prices than free market prices, no possibility to switch back to regulated prices, lack of confidence in the market or little information on market functioning, was not covered in the survey. As of January 1, 2010, 5 countries with price regulation have adopted a road-map towards a competitive market without end-user price regulation in electricity; and 1 country in natural gas. It should be noted that these road-maps in most cases do not concern all market segments with end-user regulated prices. In particular, domestic segments are often not covered. In addition, some road-maps do not give a specific removal date and time-schedule for regulated prices.

In more than two-thirds of the EU countries, the regulator sets or approves end-user regulated prices. In approximately one-fifth of the countries for electricity and one-fourth of the countries for natural gas, the decision to remove end-user price regulation lies with the regulator. A general conclusion can be drawn showing that compared to 2008 there has not been much improvement towards competitive energy-markets without price regulation within the EU. This is especially true for the domestic segment where a high proportion of countries still have price regulation. In addition, hardly any road-maps towards the removal of price regulation are in place. This may be because the European Directives leave a lot of room for interpretation regarding price regulation for domestic users. Indeed, a recent judgment of the Court of Justice of the European Union (Case 265/08, 20 April 2010) confirms that end-user price regulation, under certain restrictive conditions, is as a temporary measure, in compliance with the Directives. ERGEG reiterates its call for road-maps to phase out end-user regulated prices in the EU's Member States. ERGEG recognizes that competition also requires careful supervision, to ensure that customers are treated fairly, get the best possible deal available and are enabled to exercise their right to choose in an open market. Regulated prices can not only distort the functioning of the competitive market, but can also hinder the goal of customer protection and participation. Whilst protecting vulnerable customers is also of particular importance, social measures with that aim should be in line with market principles. ERGEG calls on all market participants to promote the efficient functioning of the

European energy markets and to facilitate the development of competition in the energy consumer's interest.

Obviously here one may dispute the notion of competitiveness of the energy market bearing in mind such factors as the appropriate number of participants, position of the enterprise with the specified market share; market entry and exit barriers; homogeneity in trade in goods or services; transparency of structure and operating principles; legal equality and principles of availability of market information to participants; control and supervision preventing cartel development (market fixing); accessibility of highly productive technology.²⁹ However, it is clearly stipulated that a Member State may maintain the procedure of tariff approval, if it supports the implementation of the general commercial interest consisting of maintaining delivery prices of natural gas to final recipients at a realistic level. Member States are obliged to agree among themselves – with regard to the situation of the natural gas sector – objectives in the form of liberalization and also essential end-user protection, as indicated in Directive 2003/55 and the new Directive of the European Parliament and the Council 2009/73/EC concerning common rules for the internal natural gas and repealing Directive 2003/55/EC.

The distribution tariff should be approved by URE President because it is a natural monopoly, but the tariffs concerning end-users should be free from confirmation even for households. In conclusion it is our opinion that excessive state interference in the regulation of prices for selling energy and in the future for distribution in the longer term does not provide improved protection of consumers. It is obvious that what was confirmed in the judgment of ETS is that price regulation primarily concerns households. If it concerns the non-discriminatory nature of the discussed obligation, the task of the URE President should be such a definition of prices so that there could be no accusations of discriminatory activity mostly within the area of distribution. That would always be the case if this type of intervention were to be conducted by the URE President to place the financial burden primarily on commercial enterprises. Obviously price regulation by the approval of tariffs by the URE President is intended to serve the general commercial interest consisting of maintaining prices to end-users at a reasonable level, bearing in mind the fact that EU Member States are obliged to reconcile objectives in the form of liberalization and essential protection of end-users, this being the very objective of the directive. Therefore the role of the national regulatory authority in the area of natural monopoly is the creation of a surrogate competitive market in the field of distribution. On condition of separating the regulatory activity from the activity performed in the competitive market, the task may be performed

²⁹ Raport UOKiK. *Kierunki rozwoju konkurencji i ochrony konsumentów w polskim sektorze elektroenergetycznym*, Warszawa 2010 www.uokik.gov.pl.

by the introduction of direct competition (comparative), where analogous activity is performed by such a large number of enterprises, that statistical assessment instruments may be applied.³⁰ The URE President in compliance with the law analyses and verifies costs, on the basis of financial reports and material-financial plans of energy enterprises, bearing in mind the creation of conditions for competitiveness and the promotion of efficiency in commercial activity and also in particular applying comparative methods in the assessment of the efficiency of energy enterprises undertaking the same type of activity in comparable circumstances but of course in the area of distribution. So we can conclude that these two types of tariffs in particular for end-users should be not approved by the URE President and the second for distribution should stay in the same scheme as it is regulated right now – approved by the URE President. One may then with confidence state that this market is more competitive, and free from end-user tariffs imposed by the URE President.

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³⁰ T. Kowalak, Quo vadis, sektorze? (2002) 1 *Biuletyn URE*, p. 39.

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