YEARBOOK of ANTITRUST and REGULATORY STUDIES
www.yars.wz.uw.edu.pl

Peer-reviewed scientific periodical, focusing on legal and economics issues of antitrust and regulation.

CSAiR
Centre of Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
www.wz.uw.edu.pl

What does an obligation to purchase "green energy" mean? Case comment to the judgment of the Supreme Court of 5 July 2007 – *Green energy* (Ref. No. III SK 13/07)

Facts

In 2002, a power company, the claimant in the commented case, purchased 7.993 Megawatt hours of renewable power directly from its producers and 157.145 Megawatt hours from an intermediary trading in renewable power. In a decision taken on 30 December 2003 (no. DPE/253/2003), the President of Polish Energy Regulatory Office (hereafter, URE), the defendant in this case, imposed a fine on the power company amounting to PLN 550,000 which constituted 0.1744% of the firm's income from its licensed activities achieved in the year 2002. The fine constituted a penalty for the failure to observe the legal obligation place upon power companies to purchase electricity from non-conventional and renewable sources. The President of URE justified the decision by stating that the obligation to purchase green-power may be deemed to be fulfilled only if the power was purchased directly from producers of such power, rather than from intermediaries.

The obligation to purchase electricity from non-conventional and renewable sources is set out in § 1(1) and § 2.1 the decree of the Polish Minister of the Economic Affairs of 15 December 2000 on the obligation to purchase electricity from non-conventional and renewable sources and generated in association with the production of heat, as well as heat from unconventional and renewable sources within the scope of this obligation[1]. Failure to fulfil this obligation justifies the imposition of a fine by the President of URE on the basis of Article 56(1(1a)) of the Energy Law Act of 10 April 1997[2] (*Prawo Energetyczne*, hereafter, PE).

The claimant submitted an appeal against the decision of the President of URE to the Competition and Consumer Protection Court in Warsaw (SOKiK). On 4 April 2005, the appeal was dismissed[3] on the basis of a literal interpretation of PE according to which, SOKiK believed the term "source" to commonly indicate the location of power generation. The claimant appealed the judgment to the Court of Appeal which

[1] Journal of Laws No.. 122, pos. 1337.
[2] Journal of Laws 2003 No.. 153, pos. 1504.
[3] Ref. no. XVII Ame 12/04, unpublished.

dismissed the appeal on 27 October 2006[4]. The Court of Appeal acknowledged that the term "obligation to purchase from non-conventional and renewable resources" meant the obligation of power companies to purchase green-energy directly from its producers. Moreover, the Court of Appeal referred to a purposeful interpretation, which, in the view of the Court, confirmed the result of a literal interpretation of the law. The Court of Appeal acknowledged therefore the fact that the claimant failed to fulfill its legal obligation to purchase renewable power and that the fine imposed by the President of URE was in accordance with the law.

The claimant appealed the judgment to the Supreme Court submitting a cassation appeal, requesting for annulling the judgment and the case to be remanded by the Court of Appeal or, alternatively, requesting for the judgment to be amended through an annulment of the decision of the President of URE of 30 December 2003. On 5 July 2007, the Supreme Court decided the appeal in favour of the claimant annulling the judgment of the Court of Appeal and changing the decision of SOKiK preceding it through the annulment of the original decision taken in this case by the President of URE.

Key legal problems of the case

On the basis of the circumstances of the case, the Supreme Court settled two fundamental legal problems: the interpretation of the term "obligation to purchase from non-conventional and renewable sources" and the nature of the regulation contained in Article 9(3) PE.

Key findings of the Supreme Court

Considering the definition of the obligation to purchase from renewable sources, the Supreme Court rejected the literal interpretation of the PE pplied by SOKiK and Court of Appeal. Instead, the Supreme Court was of the opinion that "the obligation to purchase from non-conventional and renewable sources" does not equal the obligation to purchase renewable energy directly from producers. The Supreme Court expressed a similar opinion in a previous judgment dated 25 April 2007[5]. "The Energy Law, in the wording effective until 31 December 2002, did not impose an obligation *ex lege* on power companies trading in electricity or heat to purchase electricity or heat, within the scope of their respective commercial activities, from non-conventional and renewable sources connected to a common network, directly from producers of such power or heat".

The Supreme Court also stated that such an obligation could not have been imposed on energy companies on the basis of an executive regulation relating to Article 9(3) PE, since this act is a norm pertaining to authority. On its basis, the minister in charge of economic affairs can indeed impose on energy companies an obligation to purchase renewable energy but, he cannot specify the range of subjects entitled to sell such

[4] Ref. no. VI ACa 723/05 – available at: *http://www.www.ure.gov.pl/wai/pl/282/1799/*.
[5] Ref. no. III SK 1/07 – available at: *http://www.ure.gov.pl/wai/pl/260/1496/*.

energy. According to the Supreme Court, it clearly arises from the content of Article 9(3) PE that the minister in charge of economic affairs cannot specify the manner in which to execute this obligation (at that time, Article 9(3) PE read: "The minister for economic affairs shall through a decree impose the duty on energy companies dealing with trade or the dispatch and distribution of electrical power or heat, to purchase electrical power from non-conventional and renewable sources produced in association with heat generation, as well as heat from non-conventional and renewable sources, and shall establish a detailed scope of this duty by taking energy production technology and energy source size into account as well as the manner of including costs of its purchase in tariffs").

Moreover, justifying the approach taken, the Supreme Court mentioned the judgment of the Constitutional Tribunal of Poland, which declared on 25 April 2006 that Article 9 item 3 PE conforms to the Constitution of the Republic of Poland.

Final remarks

The judgment of the Supreme Court taken on 5 July 2007 was particularly significant for the clarification of the scope of the obligation to purchase green-energy as it applied from 14 June 2000 to 1 July 2007. The obligation to purchase energy from renewable sources was at that time a new regulatory instrument that was only recently incorporated into the Polish power trading system. In this context, the judgment of the Supreme Court needs to be criticised for the opening of a third party (intermediaries) trade channel in renewable energy because the use of intermediaries in green-energy trade is a harmful phenomenon seeing as it leads to green-energy price manipulation as well as distorting the functioning of the market.

The obligation to purchase energy from non-conventional sources has now been replaced with the institution of "certificates of origin" that confirm that the method used for the production of electricity was based on renewable energy sources. According to the new Article 9a item 1 PE, an energy company dealing with the production, trade, or sale of electricity, must obtain a number of certificates of origin, as specified by way of an executive regulation, and present them for approval to the President of URE. Otherwise, a power company is obliged to pay a substitute fee calculated according to a formula set forth in the current Energy Law Act. According to Article 9e(3), the President of URE issues a certificate of origin upon an application of an energy company dealing with the production of renewable energy.

Since 1 July 2007, in accordance with Article 9a item 8 PE, such certificates can be traded through the Property Rights Market for certificates of origin for energy produced from renewable resources, which is organised by Towarowa Giełda Energii *[Polish Power Exchange]* that maintains the Register of the Certificates of Origin. Entitled to engage in such trade (brokerage firms) are only entities that are members of the Polish Power Exchange, which employ licensed brokers and possess consent from the Polish Financial Supervision Authority to maintain stock goods accounting. This mechanism provides its participants with access to the renewable energy market on equal terms and ensures the safety of turnover.

The judgment of the Supreme Court, which is under consideration here, was issued after the implementation of the property rights turnover mechanism for certificates of origin. Hence, the judgment did directly negatively affect the Polish energy field. Legislative actions have prevented an unjustified increase of green-energy prices and have sealed the system of its turnover. However, the Supreme Court should have nevertheless applied a more "purposive" interpretation of the law when deciding this case considering, in particular, all of the possible consequences associated with the acceptance of intermediation in green-energy trade.

Dr. Filip Elżanowski
Department of Administrative Procedure, Institute of Administrative Law,
Faculty of Law, University of Warsaw