

**Dr Marcin Marszałek, PhD**

Higher School of Law and Administration School of Higher Education in Rzeszów

ORCID: 0000-0001-5794-8562

e-mail: marcin.marszalek@vp.pl

# Making the Supervision over Commercial Tasks from the Public Service Area More Public vs. Limitation of Autonomy of Legal Protection for an Individual or other Entity

Publicyzacja nadzoru nad zadaniami gospodarczymi ze sfery użyteczności publicznej a ograniczenie autonomii ochrony prawnej jednostki

## Abstract

This study addresses the problem of the progressive growth of public supervision over privatized business tasks in the area of provision of a general service provided by municipal companies; the issue is presented in the comparative analysis to the regime of the public law of power companies. The undertaken analysis of the legal environment of public service enterprises is focused upon the fact that as the model of regulation of tariffs for water and wastewater enterprises (a monopolist) is amended, the recipients of their services are deprived of their right to independent administration law path for challenging such tariff as infringing their legal interests. An autonomy of an individual has been reduced in a democratic state of law and the question arises whether the actual situation is sufficiently justified; and whether the protection of an individual has been reinforced or weakened. Hence, the subject of the analysis chosen is the potential to ensure the active role of citizens in promoting and effectively achieving the integration of the EU legal system in the field of competition and consumer rights. When an individual attains its private interest, an individual may have a simultaneous participation and influence in the public sphere, in which the protection of fundamental rights is most effectively carried out in the interest of all individuals.

**Key words:** public services, public utility services, administrative regulatory supervision, protection of individual rights, EU law, constitutional law, administrative proceedings, local government units

## Introductory Comments

This study addresses the problem of progressive growth of public supervision over privatized business tasks in the area

## Streszczenie

Opracowanie podejmuje problematykę wzrostu publicznego nadzoru nad sprywatyzowanymi zadaniami gospodarczymi z zakresu świadczenia usługi powszechnej realizowanej przez przedsiębiorstwa komunalne — w analizie porównawczej do reżimu prawa publicznego przedsiębiorstw energetycznych. Tłem jest *de lege lata* wzmocnienie administracyjno-prawnych środków nadzoru nad tymi podmiotami prawa. Sednem podjętej analizy otoczenia prawnego przedsiębiorstw użyteczności publicznej jest pozbawienie odbiorcy usług przedsiębiorstwa wodno-kanalizacyjnego (monopolisty), przy okazji zmiany modelu regulacji taryfowej tego rodzaju dostawców, prawa do samodzielnej drogi administracyjnoprawnej zaskarżenia taryfy jako naruszającej interes prawny tego odbiorcy. Autonomia jednostki w demokratycznym państwie prawa została ograniczona i powstaje pytanie, czy stan obecny jest wystarczająco uzasadniony, czy ochrona jednostki została wzmocniona, czy też ma miejsce jej osłabienie? Stąd przedmiotem analizy uczyniono możliwości zapewnienia aktywnej roli obywateli w promowaniu i efektywnym osiągnięciu integracji systemu prawnego UE, na polu konkurencji i praw konsumentów. Przy okazji osiągania przez jednostkę jej interesu prywatnego może mieć miejsce jednoczesny udział jednostki i jej oddziaływanie w sferze publicznej, w której najefektywniej realizowana jest ochrona praw podstawowych w interesie ogółu jednostek.

**Słowa kluczowe:** usługi publiczne, usługi użyteczności publicznej, administracyjny nadzór regulacyjny, ochrona praw jednostki, prawo UE, prawo konstytucyjne, postępowanie administracyjne, samorząd terytorialny

of provision of a general service provided by municipal companies; the issue is presented in the comparative analysis to the regime of the public law of power companies. Intensification of administrative and legal means of

supervision over these entities *de lege lata* provides the background for it. Established legal means of impact of public administration authorities are justified by the role of safeguarding the public interest and, at the same time, the interest of an individual (or other entity) *i.e.* the recipient of services. In general, considerations regarding limitation of individual autonomy and rights of an individual apply to other entities that are recipients of services. A modern concept of public and individual interest is not difficult to understand (Stahl, 2007, p. 97–98; Zimmermann, 2014, p. 307; Żurawik, 2013, p. 57; Jakimowicz, 2006, p. 124–125, Wyrzykowski, 1986, p. 47–48 and p. 209). A public interest should not be juxtaposed with an individual interest nor should it be *a priori* (mechanically, artificially) assumed to be superior to the individual interest (Judgement of the Voivodeship Administrative Court (hereinafter referred to as WSA) in Warsaw, 2008, V SA/Wa 943/08; Zimmermann, 2014, p. 309). A public interest arising from the values related to individual interest may be defined as valid and generalized interests of individuals or other entities (Wyrzykowski, 1986, p. 39). There is a common space for both these concepts. It takes place where an entity pursues its own private rights (and interests), and the objective of the action or effects of its resolution may refer to generalized (joint) rights and interests of individuals (entities) that are in the same legal situation. The effects of resolution in an individual case may have a perfect impact on the public dimension *i.e.* the issues of interest to or pertaining to a broad range of individuals, a social group or entrepreneurs, e.g. recipients of services of the same supplier.

The trigger to write this study was the amendment of the Polish legislation in the area of tariffing prices and rates of fees for water supply and wastewater discharge by water and wastewater companies, that took place starting from 1 January 2018, on the basis of the *Law of 27 October 2017 on amendment on the law on mass water supply and mass wastewater discharge and some other laws*, following the pattern of tariff regulation applicable for power companies — see Articles 24–26 of the *Law of 7 June 2001 on mass water supply and mass wastewater discharge*. Limitation of the autonomy of local governments relative to water and wastewater companies in terms of decisions on determining the tariff for water supply and wastewater discharge is not the subject of controversy — see Article 20(1) of the *Mass Water Supply and Wastewater Discharge Law* and see Article 47(2a) of the *Power Law*. These entrepreneurs usually belong to local government entities. The separation of the ownership function and the regulatory function was justified. At present, decisions on approval or amendment of a tariff are entrusted to the competence of a new domestic regulator (water and wastewater market) independent of local governments. It should be noted that the concept of regulator includes Directors of the regional water management board of the National Water Management "Polish Waters" as the first instance authorities (of the local competence assumed to follow the division of the country into regional water management boards) and the President of the National Water Management "Polish Waters" as the higher level authority on the decisions of the first instance

authority, except for the disputable cases between water and wastewater companies and recipients of services in which the parties are entitled to appeal to the Court of Competition and Consumer Protection, constitute the national regulator. The undertaken analysis of the legal environment of public service enterprises focuses upon depriving the recipient of services of a water and wastewater enterprise (a monopolist), a right to independent administration law path for challenging such tariff as infringing a legal interest of such a recipient, which happened in the context of an amendment of the model of regulation of tariffs for this type of suppliers. A typical example of sense of such control was an opportunity to discover, in a local community (recipients of services), that a supplier topped up the tariff with expenditure unrelated to its core business (e.g. expenditure for sports sponsoring). Significant control factors and the civic initiative measure have been *de lege lata* eliminated. An autonomy of an individual has been reduced in a democratic state of law and the question arises whether the actual situation is sufficiently justified.

The subjects addressed require a broader perspective of looking at the legal environments of public service enterprises. Determination of the scope and boundaries of discretionary competence of regulators, both relative to the regulated entrepreneur (supplier) and relative to the interest (mass) of recipients of services of this entrepreneur is important in terms of determining the protected space of interests of an individual person who is an individual recipient. Defining the sense and content of the individual's interest and a basis for administrative and judicial control of resolutions of a regulatory authority allows us to draw conclusions whether the protection of an individual has been reinforced or weakened. It is also a basis for *de lege ferenda* speculations.

## Public Services Space

The sources of development of the concept of public service, derived from the European legal thinking, may be looked for in the treaty approach of the issue of provision of public service by a member state based on the legal structure of assigning an obligation of the services provided in general economic interest by the state on the exclusivity basis — see Article 14 and Article 106(2) of the *Treaty on the functioning of the European Union*, hereinafter TFEU, (in this context compare the ECJ verdict key for defining this service of 24 July 2003, C–280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg vs. Nahverkehrs-gesellschaft Altmark GmbH*). In literature and *acquis communautaire* the aforementioned services are assumed to be market services (of an economic nature) that need to be provided for the general interest (citizens, recipients, consumers) in a situation where the market fails to provide them (e.g. because of insufficient prosperity or low profitability of investments) with a sufficient stimulus — It does not ensure their satisfying level (in terms of accessibility, proper quality

and price transparency (European Commission, 2000, p. 4–23; As regards services in the general economic interest see also: Kociubiński, 2013, p. 119–123; Mielecka, 2000, p. 437 and subsequent; Nowacki, M., 2010, p. 272–274; Szydło, M., 2005, p. 133–149 and 223–231).

These services take a key position in the so called European social model, they support the values of the European Union (e.g. an internal market, sustainable economic development, stability of prices, social market economy featuring high competitiveness aiming at full employment and social progress and a high level of the quality of the natural environment) as well as academic progress. They also play a role in the enhancement of social and territorial cohesion and ensure maintenance and execution of the basic rights of the European Union (e.g. freedom, safety, cultural diversity) — see Article 3 of *Treaty on the European Union*, hereinafter TEU, and Article 14 of TFEU (see also ECJ verdict of 26 January 2006 on the T-92/02 case, *Stadtwerke Schwäbisch Hall GmbH, Stadtwerke Tübingen GmbH and Stadtwerke Uelzen GmbH vs. Commission of the European Communities*). Public services are designed to meet a fragment of social and economic needs considered to be publicly relevant (i.e. requiring intervention by the state). Public authorities are obliged to ensure the provision of these services to consumers (Łętowska, E., 2004, p. 353–359; compare: Jurkowska, A., Skoczny, T., 2010, p. XXV) and other entities (e.g. entrepreneurs, social organizations) at an appropriate level. It is irrelevant whether the state will undertake economic intervention and organize provision of these services on its own, and manage them, if an option of development of competition is legally accepted. Intervention by the state may be oriented towards supporting the economic sector, development and activation of the market, re-opening to competition and gradual withdrawal of support of state while leaving the required regulatory minimum. An obligation to provide the referenced services arises from their acknowledgement as a criterion on public service obligations by member states.

The public service obligation criterion is defined by the member states themselves — public authorities of member states at the national, regional or local level, in line with the principles of division of competences arising from the national law. They do this basing on the needs of recipients, their preferences, arising from a different geographic, social or cultural situation, but they are (ex post) verified by the Commission (see Protocol No. 26 (to TFEU) on services in general economic interest, and also Article 106(3) TFEU; compare: European Commission, 2007, p. 3–4). A large scope of freedom in defining the public service was limited in the sector harmonized at the EU level (e.g. in the communication, postal, power sectors), and in other areas of business it aims at ensuring the public interest up to the boundary of an obvious error (deformation of implementation of public interest) — specific public service obligations are indicated by recitals 45, 49, 50 and Article 3 of Directive No. 2009/72/EC and recitals 33, 43, 44, 46, 47 and Article 3 of Directive No. (see also Article 93 TFEU and

the ECJ verdict of 27 April 1994, C-393/92, *Gemeente Almelo and Others vs. NV Energiebedrijf IJsselmij*; the Commission Decision on provision of state aid no. N 890/2006 — France — SICOVAL; the Commission Decision on provision of state aid no. N 284/2005 — Ireland — Metropolitan Area Networks; compare: Kociubiński J., 2013, p. 121). Pursuant to (Motif 15 of) 2000/60/EC Directive, water supply is a public interest service according to the definition in the Communication of the Commission on services of general interest in Europe (European Commission, 1996, p. 3; see updated positions from the Commission keeping a definition cohesion on these services contained subsequently: European Commission, 2004, p. 3–4; European Commission, 2007, p. 3–4; and European Commission, 2011, p. 3–4).

Ensuring security (including regularity and quality) of supplies of electricity, heat and gaseous fuel as well as water supply and wastewater discharge, which may be perceived as development of the sales and price model (by tariff, price lists, rules of supplies) for a defined provision, fits in the category of public service obligations and it is a basic objective of a universal service (European Commission, Appendix No. 1 (2004); recitals 45, 49, 50 and Article 3 2009/72/EC Directive and recitals 33, 43, 44, 46, 47 and Article 3 2009/73/EC Directive; see also Article 93 TFEU; compare: European Commission, decision of 24 April 2007, case No. C 7/2005; and Bogdanowicz, P. 2012, p. 271 and subsequent). This is evident in the power sector (harmonized with the EU legislation of the EU) in which the universal service is contained in the service of public interest, mainly addressed to consumers (recipients in a household) — See Article 3(2) and (3) of the 2009/72/EC Directive and Article 3(2) and (3) of the 2009/73/EC Directive. The content of a universal service in the approach consistent with the obligations of power companies and water and wastewater companies is the consumer's right of access to essential goods of civilization, i.e. for provision (of a service in the area) of electricity, gaseous fuel, drinking water, waste disposal including discharge of wastewater (similarly to communication or public transport services) of a defined quality in the entire territory of a member state at justified, easily and distinctly comparable, transparent and non-discriminating prices.

In line with the national legislation, provision of a public service (or rather an obligation to provide public services) is guaranteed at the level of a statutory standard. Pursuant to Article 4(1) of the *Power Law*, "A power company (...) is obligated to maintain the equipment, installations and networks operative in terms of supply of these fuels or energy in a continuous and reliable manner while observing effective quality requirements". Article (1) of the *Mass Water Supply and Wastewater Discharge Law* provides that the water and wastewater company has an obligation to make sure its water supply and wastewater discharge equipment is operative in terms of supply of water in the required amount and under a relevant pressure and supply of water and discharge of wastewater in a continuous and reliable manner, as well as to ensure a required quality of supplied water and discharged wastewater".

## Privatization of Public Obligations vs. a Concept of a Public Entrepreneur — Cohesion of Business Tasks with the Public Sphere

The change in the model of functioning of the state in the area of business tasks and determination of the role of local government, separated from state structures, is an achievement of the period of economic transformations in Poland that took place in 1990s. The implementation of standards supporting competition was followed by the process of so-called privatization of public tasks. This process involved allocating business tasks of the state to formally independent legal entities (entrepreneurs), aiming at the reduction of costs of operations, enhancement of effectiveness, establishing an alternative for meeting social needs, resignation by the state from direct performance of business tasks and withdrawal to the role of co-organizer, its assumption of the role of an initiating entity or a supervisor (Stahl, M., 2000, p. 218–210; compare: Szydło, M., 2005, p. 50; and Biernat, S., 1994, p. 7 and 25–27). Power companies were gradually or partially privatized, achieving a higher legal and functional independence (Compare: Elżanowski, F.M., 2008, p. 15–29). Despite the foregoing, in most cases they remained dependent on the state as so-called public enterprises *i.e.* the enterprises in which public authorities may keep a dominating influence, subject to specific terms and conditions — see the definition laid out in Article 2b of the Directive 2006/111/EC, transposed to the Polish legislation in the Law of 22 September 2006 *on transparency of financial relations between public authorities and public undertakings as well as on financial transparency of some entrepreneurs*. This impact involves active and effective sharing in decision-making processes and economic leadership of a private law entity (compare: Szafranski, A., 2008, p. 86–102; and: Grzegorzczak, F., 2012, p. 167 and subsequent). Water and wastewater companies kept the status of municipal entities, mostly as sole shareholder companies and (less frequently) as state-owned plants (Article 2 of the Law of 20 December 1996 *on municipal services*). They became public undertakings of municipalities (or towns/cities). When assessing the ownership of these two groups of entrepreneurs now, a decision on the selection of a specific system (form) of ownership (how business operations of entrepreneurs should be performed) was at the sole discretion of the member state. In this area, the European Union does not prefer any ownership regime of entrepreneurs in member states pursuant to the principle of neutrality of TFEU (Article 345). This is not within the competence of the European Union. Thus, neither may privatization be ordered, nor nationalization be banned in order to establish or open the public service market (compare: Kucharski, P., 2007, p. 8–11).

Separation and independence of municipal entrepreneurs has not solved the problem of blurring of differences between the public task zone and economic tasks in which the state or a local authority should compete on equal terms with other entrepreneurs. It should be emphasized in the first place that the EU legislator accepts an active involvement of public law entities in business operations, providing that "public

undertakings play an important role in the national economy of member states" (see recital 2 of 2006/111/EC Directive). Using the organizational and legal form of an entrepreneur of the 'legal person' type in the form of a limited company as a basis for the implementation of tasks significant for the functioning of the economy allows, on one hand, for a more effective completion of public tasks (more efficient organization and decision-making process), and on the other hand, it features a higher safety of trading (compare: Grzegorzczak F., 2012, p. 24 and 163–164). Business operations of this type remove the direct involvement of the state or local authority and liberate it from the risk of legal business decisions. It allows them to maintain an active role of public power in business processes and as an initiator of business projects that may not be oriented towards profit making (*non-profit organization*), but that find an axiological justification in the hierarchy of values of a state or local authority organization (*e.g.* satisfaction of collective needs of a local community). The triggers and justification of business decisions in a public undertaking oriented towards the objectives and tasks of a state or a local authority make a broadly understood common good that does not necessarily collides with an economic effectiveness *i.e.* orientation towards profit.

A power company and a water and wastewater company do not perform any tasks of a public authority, although they perform (which is conceptually broader) public tasks allocated to them pursuant to specific and distinct statutory standards (compare: the verdict of the Supreme Administrative Court of 18 August 2010, I OSK 851/10). They are subjects that are independent of administration understood as the clerical apparatus (an institutional system) *i.e.* from the public power authorities. They implement some public tasks of satisfying collective needs of recipients allocated to them and, at the same time, they have responsibility for the state's power safety and sanitary and epidemiological safety that are the *sine qua non* precondition for maintaining internal safety and public order. Implementation of public tasks is done under the supervision of administrative authorities (*e.g.* regulators). It is assumed that performance of public tasks is always related to the execution of basic subjective public rights of the related citizens. The tasks of undertakings such as a power company or water and wastewater company, due to its significance for civilization development and the standard of living of citizens, in particular, electricity and water of specific parameters, serve to the achievement of a common good as referred to in Article 1 of the *Constitution of the Republic of Poland* and thus, they are "public tasks" (see: the verdict of the Voivodship Administrative Court in Lublin of 23 April 2013, II SAB/Lu 121/13; compare: the verdict of the Constitutional Tribunal, of 25 July 2006, P 24/05).

### State Supervision over Business Regulation

Regulation in a narrower sense, limited to infrastructural sectors and undertakings being a state or local government monopolies in the past shall be understood, pursuant to the

German law, as the law of effects of privatization oriented towards entrepreneurs requiring business regulatory supervision (Stober. R., 2013, p. 274). It is obvious that along with neutralization of monopolies or limitation of dominating entities, the stimulation of competition or the elimination of agreements limiting competition (compare: Skoczny, T., 2007, p. 138–150) the objective of the law of regulation of business operations is to fulfil the tasks arising from regulatory objectives, including the issue of economic infrastructure. These objectives include: the establishment of operative, functioning, undistorted competition or its substituting, a guarantee to ensure basic goods and services (of common, public service goods — so called "policy goods") related to access to economic infrastructure and that are perceived as necessary in a civilized society by their accessibility, affordability, continuity and quality, satisfying other economic and legal requirements (compare: Ziekow, J., 2007, p. 231–232 and 236; and: Stober, R., 2013, p. 274).

A characteristic feature of administrative, economic and legal regulation is the fact that apart from establishing the freedom of business operations (freedom of entrepreneurship), it also establishes freedom of competition, and it requires maintaining the compliance of the interested entrepreneurs with the commitments made in the name of common goods (Stober. R., 2013, p. 274) *i.e.* action for the public interest. A regulator enters where the market does not operate properly, it emphasizes its shortcomings, and it does so to replace market mechanisms with administrative measures. The regulation may be presented, although in some simplification, as the actions entering the space of economic liberty of an entrepreneur aimed at imposing a specific shape or restoration of proper functioning of economic processes in the market solely pursuant to and within the boundaries of a public interest that is to justify these actions. Regulators — the President of the Energy Regulatory Office (hereinafter referred to as ERO) and the head of the regional water management board of the National Water Management "Polish Waters" (as the higher level authority) — aim at harmonizing the business of an entrepreneur-supplier with their regulatory tasks and objectives (*e.g.* security of supplies in a form of ensuring continuity and reliability of suppliers, affordability of services provided by suppliers, keeping the supplier's right to fair profit) and at balancing the interests of entrepreneurs (suppliers) with the interests of recipients, including consumers (see Article 21(1) and Article 23(1) and 2(12) of the Power Law, and Article 27a(1) and (3) of the *Mass Water Supply and Wastewater Discharge Law*).

In the modern model of regulation of power companies and water and wastewater companies in Poland, two potential platforms of conflict may be distinguished: vertical — between an entrepreneur-supplier and a regulator; and horizontal — between formally equal legal entities in the area of agreements pending execution or executed agreements. The examples of vertical disputes include: (1) granting, refusal to grant, amendment and withdrawal of the license for operation of a power company, or a permit for the water and wastewater company, (2) approval and

controlling of tariffs, (3) imposing financial penalties pursuant to the terms and conditions laid out in Article 56 of the *Power Law* and Article 29 of the *Mass Water Supply and Wastewater Discharge Law*. At a horizontal level, in turn, resolving disputes between entrepreneurs and recipients of services should be distinguished in the subject of refusal of execution of an agreement or unjustified discontinuation of supplies — pursuant to Article 8(1) and (2) of the *Power Law*. and Article 27e of the *Mass Water Supply and Wastewater Discharge Law*), disputability of interests of the parties pertains to the civil law relation connecting them or the potential civil law relationship (between them) (*e.g.* a service provision agreement).

Potential conflicts in the tasks of regulators vertically and horizontally are resolved by means of two groups of measures of influence. The first group includes means involving the competence (*i.e.* legal obligation) of a regulator to issue administrative acts and a sovereign intervention in the liberty of entrepreneurship of suppliers *e.g.* by tariffing, licensing (or granting a permission) and an order to execute an agreement or continuation of supplies. An administrative decision, issued in the process of tariffing, is the most powerful instrument of regulation; it forms regulatory obligations (by instructions, prohibitions or development of a legal relationship on the verge of the public and private law arising from the public law). The regulator's resolution is an instrument of protective market control (*ex ante* mechanism).

The second group of administrative law measures features a lack of sovereign influence, it seems — on open manners of performing administration (*e.g.* controlling the operation of entrepreneurs-suppliers in terms of its compliance with legal provisions, co-operation with relevant authorities in counter-acting competition-distorting practices by the suppliers). In this group of legal measures, regulatory authorities issue a number of information acts (playing a role of instruments) (so called *soft law*), making the accepted interpretation of law or qualification of legal events more public, in the non-specific and non-customized (generalized) presentation in the form of the following: by publishing positions, recommendations, instructions, information, and opinions. These do not have a legally binding character, they are not required to be followed, but they disclose a potential direction of regulatory acknowledgement and, in this way, and, as a rule, they are considered binding by the entities from the outside of the administration.

### **Making the Supervision of Determining Prices for Water Supply and Wastewater Discharge More Public**

In vertical disputes, *e.g.* related to tariffing, a recipient may not participate in the proceedings or initiate the means of appeal. As a matter of standard, a recipient is not entitled to a legal interest in such proceedings (which will be

discussed below, in para. 6). This used to be the standard in the power industry, and is presently justified by the number of sellers (suppliers) competing with each other in the market and by their freedom to select a supplier. In terms of water and wastewater companies, there was an evolution of regulations and deprivation of a recipient (since 2018) of a legal interest in challenging the provisions of the approved tariff. The recipient's situation from before the amendment of the provisions of law discloses the benefits of allowing a broader autonomy and a regulatory control function to an individual.

Pursuant to Article 24(1) and (4) of the *Mass Water Supply and Wastewater Discharge Law*, in the wording effective until 31 December 2017, as requested by the water and wastewater company (supplier), the tariffs were subject to approval by the resolution of the municipal (or city) council, upon prior verification of the suitability of incurring costs set forth as the basis for tariff calculation by the head of a rural municipality [wójt], or mayor of a town/city. The executed resolution could be challenged by the voivode in the manner of a supervisory resolution involving the assessment of legal compliance of the operations of municipality (city/town) authorities (Article 91(1) of *Law on Municipal Government*). A municipal authority could appeal from the resolution of the voivode to the Administrative Court (Article 92a and Article 93 of *Law on Municipal Government*). The tariff was meant to pay for justified costs of collective water supply or collective wastewater discharge (Article 24a(1) of *Mass Water Supply and Wastewater Discharge Law*), and upon an update in 2017, to ensure payment of justified costs of the operations of the supplier's undertaking (Article 24c (40) and Article 24i(1) of *Mass Water Supply and Wastewater Discharge Law*). Detailed on-going and investment costs of business operations and the provision of services were meant to and are to guarantee the required revenues to a supplier and protect recipients from an unjustified level of prices. There is an obligation, for the sake of tariffing, to keep accounting records to ensure transparency of a supplier and its easier control (see: Article 2(2), Article 20(1–5), Article 23(1–2) *Mass Water Supply and Wastewater Discharge Law*).

A supplier should present detailed financial data attached to the tariff request, including illustrative actual costs of operation and the expenses related to water supply and wastewater discharge (Article 24b(4–7) of *Mass Water Supply and Wastewater Discharge Law*). Despite the foregoing, the legislator granted the recipient a right to submit an administrative complaint — either on the recipient's own behalf or representing a group of citizens in the municipality who have expressed their written consent for the resolution of the municipal council (or a city council) on approval of a tariff (Article 101(1) and 2a of *Law on Municipal Government*). A source of the individual's rights to pursue their legal interest by charging a regulatory authority in the municipal government with violation of law were, in this case, the legislative regulations [*przepisy ustrojowe*] on municipal government. Granting a control function of the operations of the local government to the

regulatory individual was perceived as a representation of empowerment of an individual in the public law and ensuring the direct (active) participation of an individual in a democratic state of law. Pursuant to the case law, it is possible to recover the content of a legal interest of an individual submitting a complaint to the regulation on a tariff. The interest of the complaining party was demonstrated in the fact that, as a citizen of a given municipality, in practice, it was forced to use the services provided by the supplier (having a monopolist position in the local market in the area of services involving collective water supply and collective wastewater discharge). Violation of this interest involved, at least, an extension of (pursuant to the resolution of the municipal board) the validity of the tariff for these services which, in fact, consisted of maintaining the previous prices of these services or a raise. So, if according to the complaining party, these tariffs have already been overcharged before, then, their extension directly affected the scope of rights and obligations of the users of these services, including the complaining party (the verdict of the Voivodship Administrative Court in Kielce of 17 December 2015, II SA/Ke 854/15). As found by the Supreme Administrative Court, at present, only the fact of living and therefore, using water and wastewater devices should be considered as confirmation of the existence of a legal interest in filing a complaint on the tariff, if pursuant to the challenged provisions of a tariff the individual was obligated to incur specific fees arising from the approved tariff. The appealed resolution, as an act of public administration, directly affected and influenced the rate of its financial commitments relative to the water and wastewater company. Infringement of a legal interest or a right by the challenged resolution occurred when this infringement was valid and when it was an individualized infringement, aimed at actual legal goods that could be indicated and that were used by the complaining party itself. The infringement of the legal interest should be distinguished from its existence which took place in the case when the challenged resolution on approval of a tariff was illegal (the verdict of the Voivodship Administrative Court in Wrocław of 28 April 2017, II SA/Wr 130/17) or, in other words, if it infringed the provisions of the *Mass Water Supply and Wastewater Discharge Law* (e.g. by unauthorized increase of a price), (the verdict of the Supreme Administrative Court of 19 May 2016, II GSK 1148/16; and the verdict of the Supreme Administrative Court of 26 January 2017, II GSK 5550/18).

The amended Law on Collective Water Supply allocated the power to approve the tariff to a new, national regulator imitating the President of the Energy Regulatory Office, in administrative proceedings and (within the hybrid proceedings, followed by) judicial proceedings starting from 1 January 2018. In this type of case in regulation of the water and wastewater market (which is equivalent to the regulation of the power market), the involvement of a recipient of services of the regulated supplier is excluded. Approval of the tariff (*ex ante* measure) used by the regulatory authority is aimed at ensuring effective

supervision over pricing and fees for collective water supply and wastewater discharge, at protecting consumers against unjustified costs, and at eliminating the risk of unjustified increase of rates of fees and the risk of a conflict of interest in deciding on the revenues of a municipal undertaking by a local government. Centralization of regulatory tasks relative to approximately 2 thousand tariffs of water and wastewater companies in Poland will contribute to making the regulatory authority more professional and consolidate the principles of tariffing and resolving disputes of recipients and water and wastewater companies. Another issue is that of systemic features of this authority that are to constitute its independence (compare: Niewiadomski, Z., 2009, p. 196–198), manifested by its position in the government administration, its distinguished legal status, and its supervisory relation. In this context, the systemic position of the President of ERO, anchored in the EU legislation, occurs stronger.

The boundary of administrative acknowledgement of a regulator on one hand allows for more effective achievement of effective competition in the market and protection of interests of the weaker party (*e.g.* a consumer or a prosumer). On the other hand, it requires catching the practice of the entrepreneurs' operation in a given market and premises for proper market behaviours in order to determine the premises or a boundary of a fair profit and a notion of commercial and technical follow-up for the remaining market players (compare: Banasiński, C., 2006, p. 94–114). A justification for qualifying (*i.e.* regulatory) intervention of the authority in the market is provided by the expertise from the market and the ability to anticipate it. The regulatory discretion is not only the freedom to assess the actual condition and the scope of use of relevant measures, but also the freedom to choose between various measures (within the boundaries of the principle of proportionality, a proper selection of the means to the target), (Jaroszyński, K., Wierzbowski, M., 2011, p. 318–319).

### **Protection of the Rights of an Individual (Recipient) by Economic Supervision Authorities**

Regulatory authorities are a guarantor of the protection of interests of recipients whose rights and obligations are laid out in the tariff; the range of statutory tasks and targets (*e.g.* care about safety in the form of ensuring continuity and reliability of supplies, affordability of suppliers' services, and the suppliers' right to profit) and the power in the subject of approving the tariff in line with this extent account for the content of a significant public interest allowing the limitation of business activities' liberty (and other economic rights and liberties) of entrepreneurs — suppliers (see: Article 20, Article 22, Article 64(1–3) and Article 6(1) of the *Constitution of the Republic of Poland*). The subject-based limitation remains to be in a functional relationship with the implementation of the values set forth in Article 31(3) of the *Constitution of the Republic of Poland* (*i.e.*: security of state, public order, environmental protection, public health and

morality, liberties and rights of other persons), See the verdict of the Constitutional Tribunal of 17 May 2006, K 33/05; the verdict of the Constitutional Tribunal of 21 April 2004, K 33/03; compare: the verdict of the Constitutional Tribunal of 7 June 2005, K 23/04). If it is assumed that the core of the public service is its accessibility at any time, in a sufficient amount and at a price reasonable for the recipient, with simultaneous compliance with environmental requirements, this understanding of a service makes it possible to satisfy various needs of the recipients, relating equally to the sphere of their business activities and personal needs (social and accommodation). This accessibility is an important guarantor of the public order and even of national security. The core of the protection of the public interest and third parties (recipients) that belongs to regulatory authorities gives effect to the constitutional rights and liberties of individuals (recipients).

*De lege lata* protection exercised by a regulator in administrative proceedings involves, most frequently, the delimitation of liberty of pricing within a tariff by administrative proceedings in the subject of approval of a tariff set by an undertaking prior to its effective date (a model of *ex ante* regulatory intervention). Binding statutory guidelines of limitation are the supplier's assurance of incurring justified costs of business operation performed with due care and a right to a fair profit (*i.e.* a margin ensuring return on the invested capital) that guarantee the supplier's existence and the protection of recipients' interests, in assumption, weaker market players against unjustified level of prices (see Article 45 of the Power Law; and the verdict of the Supreme Court of 28 June 2002, I CKN 1234/00). Administrative proceedings progress without the participation (actual or potential) of the recipient, who is not entitled to the status of a party thereto (see Article 30(1) and Article 45–47 of the Power Law, and Article 24b–24j and Article 27c(1) of the *Mass Water Supply and Wastewater Discharge Law*; see also the provisions of the verdict of the Supreme Court of 8 March 2000, I CKN 1217/99). No provision of a material law permits the reconstruction (even by the way of a functional interpretation) of a legal interest of an actual or potential recipient. The recipient's actual interest has, as a rule, an economic dimension (it is followed by the expectation to be getting lower bills), (the verdict of the Court of Competition and Consumer Protection of 8 March 2007, XVII AmE 119/06; the verdict of the Anti-Monopoly Court of 15 May 2002, XVII AmE 61/01) — see also Article 24c(6) of the *Mass Water Supply and Wastewater Discharge Law* delimiting the environment of participants of the proceedings in the subject of approving the tariff directly defining that a relevant head of the commune [*wójt*] (mayor) are the parties along with the supplier.

It should be observed that an intensified protection of consumers (recipients) exercised by the President of the Office of Competition and Consumers' Protection accounts for an important measure for the protection of the recipient's interests. The President of the Office of Competition and Consumers' Protection is obliged to commence, *ex officio*, proceedings on practices infringing collective consumers'

interests and proceedings in the cases for acknowledging the provisions of a specimen agreements as forbidden provisions. In case a supplier fails to execute the decisions of the President of the Office of Competition and Consumers' Protection or a court verdict, such supplier shall be threatened by imposing a financial penalty by the President of the Office of Competition and Consumers' Protection of EUR 10,000.00 for each day of delay in execution of a decision or a verdict (Article 49(1) and Article 99a–107 of the *competition and consumer protection Law*). Within the sphere of a private law, the status of a recipient as a consumer expands the scope of measures of contractual protection of a weaker party. These measures are standardized in a Civil Code *e.g.* in the area of an effect of non-transparency of the model translated *in dubio contra proferentem* (*i.e.* for the benefit of a consumer — Article 385 of the *Civil Code*), (see: Bednarek, M., 2006, p. 615 and 649–651; compare: Radwański, Z., 2008, p. 87–88 and 93; compare also: Łętowska, E., 2004, p. 263–264 and 275–277; and: Łętowska, E., 2002, p. 322 and 40; as well as: Łętowska, E., 2001, p. 95) or a lack of so called binding with forbidden contractual provisions (abusive clauses — Article 3851(1–3) of the *Civil Code*), (See Zelek, E., 2012) pursuant to the rulings whose extended legality means effectiveness relative to all consumers who executed an agreement with a supplier specified in a ruling on the basis of the model indicated in the decisions of the President of the Office of Competition and Consumers' Protection or in the court ruling — see provisions of the *Code of Civil Conduct Law* — Article 479<sup>42</sup>(1) and Article 479<sup>43</sup> in the wording effective until 4 August 2015, and Article 479<sup>45</sup>(2) of *Code of Civil Conduct Law* in the wording effective until 17 April 2026 — pursuant to the Law of 5 August 2015 amending the law on protection of competition and consumers and some other laws. Pursuant to Article 8 of this law, the register of forbidden clauses will stop applying starting from 18 April 2026 — the published decisions of the President of the Office of Competition and Consumer Protection and the verdicts of courts in the cases for acknowledgement of the provisions of the specimen of the agreements will now replace the functions of the register in the cases for considering the provisions of the specimen of the agreement to be forbidden or on the cases of practices infringing collective interests of consumers. See also Article 23b–23d of the *Law on protection of competition and consumers*. Covering micro- and small enterprises with this protection is missing from a sophisticated palette of measures of legal protection. The level of awareness and disposal of assets of these participants for undertaking protection of their justified interests as a rule only slightly exceed the consumers' position. In confrontation with the potential (economic, organizational and legal) of suppliers, the situation of this group of entrepreneurs, in my opinion, requires urgent, legal reinforcement.

Apparently, additional protection of interests of a recipient provides opportunities for notifying regulators about irregularities (overcharging) of the costs calculated in the tariff presented for approval. The undertaken follow-up of implementation of regulatory obligations in case of

confirmation of a charge will evoke an *ex post* effect in the form of imposing an administrative financial penalty on the supplier's manager (see: Article 29(1–4) and (8) of *Mass Water Supply and Wastewater Discharge Law* and Article 56(1)(7a), (8) and (5) of *Power Law*). The sanction burdens the property of a supplier and contributes to the interest of the state budget and does not translate into the improvement of the recipient's situation.

## Final Remarks

Making the supervision over water and wastewater companies more professional is aimed at ensuring more efficient and effective legal impact on the entrepreneurs in question. It is also meant to take the burden off individuals (citizens) for pursuing their public rights — a right of the public service. The model of protection of the individual's rights deprives such an individual, even if it is only a small group of people, of the right of their own involvement to ensure or improve the effectiveness of legal regulations. In the market of suppliers of energy or gaseous fuels with increased competition, a recipient may change the supplier relatively easily. The situation in the water and wastewater services is very different; there being only one supplier — a monopolist. There are about two thousand of this type of contained (*i.e.* with no competition) markets in Poland. A return to granting the recipient the right to challenge a tariff of the monopolist-supplier on his/her own would correspond to the tendencies in European law. Private interests represented before the European Court of Justice (ECJ) in a dispute with the EU member state disclose an active role of citizens in promotion and effective achievement of integration of the legal system of the EU in the field of competition and consumers' rights (see Helios, J., 2013, p. 29–30 and 34). If one should rely on these experiences, then restoring the individual's right to challenge the tariff would provide adequate and useful mechanisms of coordination with the administration and a substitute for intervention of the state (*i.e.* regulators) pursuant to the effective legislation. Individuals often have relevant educational background and a broad professional background that allow them to look at the presented legal issues from the perspective of other markets, other economic experience or protection of fundamental rights. An individual's right would support self-regulation of suppliers, subject to social control of individuals-recipients at the local level. It would lead to an improvement of the private protection of the autonomy of individuals with minimum (involvements and) public intervention by regulators (compare: Prosser, T., 2008, p. 235–53). Granting a right to an individual would support activation of pro-civic attitudes for common good, required for a feeling of having a direct impact on co-establishing a state of law in modern societies of democratic states. The feeling of agency and effectiveness of pursuing their rights are the triggers that make private entities get engaged in the public sphere. It is demonstrated just by autonomous actions of an



individual for protection of its unit private interest. These actions may contribute to the protection of rights of the public, and they certainly provide a basis for revision of the adequacy and sufficiency of standardized protection of basic rights of an individual.

Of equal importance, the pursuing of a right by an individual contributes to the interest of the public, as pursuing a right of

the public by a regulator contributes to entities. There is no conflict here, but rather a parallelism relation or at least a partial cohesion. If an individual interest coheres in a given case with the public interest, the sovereign operation of the state could be then used for full achievement; it is the coercion of state in order to resolve for the benefit of both an individual, and the public.

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**Dr Marcin Marszałek**

PhD in law, lecturer at Higher School of Law and Administration Rzeszów School of Higher Education, legal advisor.

**Dr Marcin Marszałek**

Doktor nauk prawnych, wykładowca WSPiA Rzeszowskiej Szkoły Wyższej, radca prawny.