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What is the link between Article 6 Section 3a of the Energy Law Act and Article 490 of the Civil Code regarding the right of a grid operator to suspend the supply of electricity? Case comment to the judgment of the Supreme Court Judgment of 5 June 2007 – *GZE* (Ref No. III SK 11/07)

Facts

On 5 June 2007 the Supreme Court delivered a judgment[1] that concluded a long lasting legal dispute between a grid operator – Górnośląski Zakład Energetyczny (hereafter, GZE), acting as the plaintiff in this case, and the President of the Polish Energy Regulatory Office (hereafter, URE), acting as the defendant. The judgment of the Supreme Court directly concerned an earlier decision taken by the President of URE, which adjudicated a contractual dispute between GZE and Huta Łaziska steelworks (customer seeking third party access) regarding the terms of a transmission services contract to be concluded between those two companies. The economic origin of the dispute lied in the fact that Huta Łaziska intended to purchase electricity from a "third" (independent) supplier – a power producing company Zakład Energetyczny Pątnów-Adamów-Konin. For that purpose, in 2003 and 2004, it entered into a third round of negotiations with GZE, the local grid operator for the southern part of Poland and the Silesian region, concerning the conclusion of a contract that would grant Huta Łaziska access to the grid belonging to GZE, which was necessary in order to obtain the electricity purchased from the alternative supplier.[2]

Till the time of the controversy both parties had been previously bound by two transmission services contract. This time however, they could not reach an agreement concerning some of the terms of the new contract. Considering the judgment of the Supreme Court that is under review here, the most interesting points of dispute between the two companies were: (1) the use of an advance payment scheme for transmission services in light of some disputable claims arising from previous transmission services contracts concluded between the parties and, (2) the level of the prices and fee rates

[1] Judgment of the Supreme Court of 5 June 2007, III SK 11/07 – available at: *www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/akt_iii_sk_11-07_05-06-2007.pdf*

[2] Decision of the President of URE of 19 February 2004, DPK-511-1(10)/2004/ZM, amended by the decision of 25 March 2004, DPK-5111-1(14)/2004/ZM.

for the provision of transmission services considering, in particular, that Huta Łaziska proposed its own calculation scheme that was different from the GZE's tariff, which was approved by the President of URE according to Article 47 of the Polish Energy Law Act (*Prawo Energetyczne*, hereafter, PE).

Key legal problems of the case

Upon the request of the parties submitted pursuant to Article 8 PE, the President of URE settled the dispute between Huta Łaziska and GZE in a decision issued on 19 February 2004[3]. Having acknowledged that GZE was to provide transmission services to Huta Łaziska, according to Article 4(2) PE, the authority stipulated the content of the agreement between the parties in regard to the contractual provisions under dispute.

In the context of the advance payment scheme, the President of URE pointed out, that the core of an administrative settlement of conflicts between firms negotiating third party access is the substitution of market mechanisms. The President of URE made reference here to a pattern of a "reasonable entrepreneur acting on a competitive market". Also taken into account was the fact that, at the time the decision was taken, a litigation was pending concerning earlier contractual obligations of Huta Łaziska and GZE. In that light, the authority concluded that there was a sufficiently legitimate reason for the incorporation into the contract of a provision obliging Huta Łaziska to pay instalments for the transmission services at least 10 days before their provision is due, in a ten-day-period. The President of URE formulated this contractual clause according to Article 491 § 1 of the Polish Civil Code (*Kodeks Cywilny*, hereafter, KC) and Article 6(3a) PE, which entitle the power supplier, such as the grid operator, to suspend the supply of electricity if the customer delays the payment for electricity or transmission services, provided that the delay amounts to at least a month after the due date of the payment and, provided that the delay persists in spite of a prior written notification of the intention to terminate the contract.

Considering the level of prices and fee rates for transmission services, the President of URE stressed that even though grid operators and other energy companies are entitled to vary their tariff prices and fee rates for their transmission services (according to Article 45(4) PE), they may only do so in relation to entire groups of customers, and solely on the basis of justified differences in costs related to the provision of the services to the particular groups of customers. According to the President of URE, the permitted variations of prices and fee rates did not apply to individual customers. Thus, individual charges were subject to negotiations and individual arrangement between the parties solely within the scope of Article 45(4) PE. As a result, the President of URE used GZE's existing tariffs as the basis for the determination of the prices and fee rates for transmission services provided to Huta Łaziska.

[3] Decision of the President of URE of 19 February 2004, DPK-511-1(10)/2004/ZM, amended by the decision of 25 March 2004, DPK-5111-1(14)/2004/ZM (unpublished).

Both parties appealed the decision of the President of URE to the first instance Court for Competition and Consumer Protection (hereafter, SOKiK)[4] and later, to the second instance Court of Appeal[5]. Both courts dismissed the appeals considering them to be unfounded; they upheld the decision of the President of URE. GZE argued that the President of URE infringed the grid operator's right for sufficient defence of its economic interests because the authority did not incorporate into the contract a clause pursuant to Article 490 KC. Such provision would enable GZE to immediately suspend its services to Huta Łaziska if the steelworks delayed their instalment payments for these services. In fact, both companies submitted serious objections in relation to the clause that obliged Huta Łaziska to pay instalments for the transmission services. In the opinion of GZE, all of the instalments should have had to be paid at least one month before the provision of the services was due. Huta Łaziska argued to the contrary stating that this condition had an onerous character and no legal basis, considering that the requirements of Article 6(3a) PE were not fulfilled in this case. Besides, the questionable condition would illegally substitute the mechanism of prepayment metering and settlement facility contained in Article 6a PE (the conditions of its application were however also not met).

Huta Łaziska objected also to the fact that the President of URE determined the prices and fee rates for the contractual services on a basis of the grid operator's approved tariff and thus, seriously infringed the rule of equivalency of mutual obligations. In the opinion of Huta Łaziska, this approach did not reflect the actual justified costs of the provision of the services. According to the calculations of the steelworks, the prices and fee rates should have been set at a much lower level than the ones approved in GZE's tariff, otherwise they would allow cross-subsidisation. Huta Łaziska argued that prices and fee rates included in the tariff of the grid operator, approved according to Article 47 PE, should be regarded as maximum prices only. The decision of the President of URE suggested however that the authority treated them as fixed prices instead (prices not subject to negotiations or reduction).

Referring to the arguments of GZE, both courts stated that Article 6a PE did not entitle the grid operator to immediately suspend its transmission services. Article 6a PE merely allowed a grid operator to install a prepayment metering and settlement system if certain, precisely formulated conditions were met, that is, if the customer, among other things, had at least twice delayed the payment for the services received for a period of at least one month within 12 subsequent months. However, these conditions cannot apply in a given case. In the opinion of the courts, a clause that would oblige Huta Łaziska to pay instalments at least one month before the provision

[4] Judgment of the Court for Competition and Consumer Protection of 3 August 2005, AmE 32/04 – available at: *http://www.ure.gov.pl//ftp/prawo/orzecznictwo/okik/wyroki/2005/ame_32-04_3-08-2005.pdf*

[5] Judgment of the Court of Appeal in Warsaw of 19 July 2006, VI ACa 95/06 – available at: *http://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_ap/2006/via_ca_95-06_19_07_2006.pdf*

of transmission services is due for a given ten-day-period, as requested by GZE, would create an excessive and unjustified burden for the customer.

On the other hand, previous disputes between the parties due to their past contractual relations justified, in the opinion of the courts, the implementation of a specific guarantee in favour of the grid operator in the form of the instalments paid in advance in ten-day-periods. However, the courts agreed that the obligation to pay such instalments at least 10 days before the due date of the provision of services, as formulated by the President of URE, sufficiently secured the economic interests of the grid operator. According to the courts, Article 490 KC was not infringed seeing as the contractual terms drafted by the President of URE did not exclude the application of this legal provision. Furthermore, the fact that Huta Łaziska had some arrears still outstanding (resulting from past agreements with GZE) did not justify a presumption that its performance under this contract was unlikely or uncertain. No reasons were also found to change the contractual clauses concerning the right of the grid operator to suspend its transmission services because Article 6(3a) PE was unconditionally applicable and enjoyed priority over Article 490 KC.

Considering the objections of Huta Łaziska in relation to the level of prices and fee rates set in the decision of the President of URE, both courts reconfirmed their previous judgments as well as quoted a judgment of the Supreme Court of 9 March 2004 (III SK 18/04) where it was said, based upon Article 735 § 2 KC, that while adjudicating a dispute between parties according to Article 8 PE, the President of URE should not apply other prices and fee rates than the ones set in the tariff of the energy enterprise concerned.

Key findings of the Supreme Court

GZE was the only party to submit a cassation appeal to the Supreme Court which dismissed the appeal on 5 June 2007. The Supreme Court agreed with the views of the courts of the lower instances, repeating the arguments presented in their sentences. In the opinion of the Supreme Court, the argument that the decision of the President of URE infringed Article 490 KC was unsubstantiated since the wording of Article 6(3a) PE was clear, precisely establishing the right of the grid operator to suspend the supply of electricity in such a manner that excluded the application of Article 490 KC in this case. The same view had to be taken in relation to the objection of the infringement of Article 6a PE. In the opinion of the Supreme Court, a "prepayment metering and settlement system" equals a mechanical device that requires physical installation. Thus, this provision should not be interpreted extensively; it was, in so far, inapplicable as the conditions set forth in Article 6a PE did not occur in the given case.

Final remarks

The presented case addresses some of the practical questions concerning the interpretation of the Polish energy law regime in relation to the concept of "economic" reasons of legitimate grid access denial, which were disputed by the legal doctrine already[6]. In the lower instances only, this case concerns the question of the nature of the prices and fee rates for transmission services (grid access) and the rules for their determination[7].

Non-discriminatory access to the grid for all customers and independent suppliers constitutes one of the most important pro-competitive instruments of energy law. According to Article 4(2) PE, grid operators shall be obliged to provide the transmission or distribution services of electricity to all customers while the latter shall have, pursuant to Article 4j PE, the right to purchase energy from the supplier of their choice. These provisions implement the so-called "third party access" rule contained in Article 20(1) of Directive 2003/54/EC. The details of "third party access" are subject to negotiation between the parties. Thus, while access to the grid is, according to Polish energy law, carried out on a contractual basis, access prices must conform to the rules set out in Directive 2003/54/EC. As a result, access prices should be based on tariffs published by grid operators that are applied objectively and without discrimination between system users (customers).

In the context of this rule, there is no consensus among the Polish legal doctrine and judicial practice as to what conditions must be met for a grid operator to have the right to refuse the provision of transmission services. Directive 2003/54/EC mentions only one factor that constitutes a sufficiently legitimate reason to refuse access – lack of necessary transmission capacity. However, considering the "essential facilities doctrine", not only technical reasons but also legitimate economic interests of the grid operator might be taken into account when determining whether the refusal was sufficiently justified or not. Those legitimate economic interests include: the impracticability of third party access and difficulty to provide services to the customers of the essential facility holder[8]; the

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[6] See e.g. A. Walaszek-Pyzioł, *Energia i prawo* [*Energy and law*], Warsaw 2002, p. 152; J. Baehr, E. Stawicki, [in:] J. Baehr, E. Stawicki, J. Antczak, *Prawo energetyczne. Komentarz* [*Energy law. Commentary*], Poznań 2001, p. 47.

[7] The discussion concerning the nature of tariff's prices and fees for transmission services has led in the past to significant controversies in the Polish doctrine. Some authors argued that an approved tariff sets out fixed prices (not subject to negotiations or alterations) – S. Gronowski, "Rozbieżność ocen" ["Discrepency of assessments"] (2000) 132 *Rzeczpospolita*, 7 June 2000, p. C2; H. Palarz, *Prawo energetyczne z komentarzem* [Energy Law with a commentary], 2 ed., Gdańsk 2000, Article 47; others saw them as maximum prices only in accordance with the "price cap regulation" regime – A. Walaszek-Pyzioł, op.cit., p. 139 – till now this question has been cleared in the judgment of the Supreme Court of 9 March 2004, III SK 18/04 – available at: *www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/akt_iii_sk_18-04_09-03-2004.pdf*

[8] *Hecht v. Pro Football*, 570 F. 2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978).

lack of incentives to develop the infrastructure[9]; the lack of customer credit standing[10]; the inefficiency of the exploitation of the facility due to third party access[11].

The wording of Article 4(2) PE in its original version was imprecise stating that grid operators should grant third party access if the "economical" conditions for the supply were fulfilled. The Polish legal doctrine was therefore concerned that the recognition of economic reasons as a legitimate justification for access denial would have lead to abusive conduct of grid operators[12]. Nevertheless, in light of general rules of civil law, some circumstances, referring primarily to the capacity and willingness of customers to pay for the transmission services, were acknowledged as legitimate grounds for the denial of grid access[13]. Article 490 KC played a fundamental role here entitling, in case of mutual obligations, one party of the agreement to suspend the performance of its contractual obligations if the performance of obligations of the other party is doubtful.

However, as stressed by the President of URE and all of the courts, the provisions contained in Article 6(3a) and Article 6a PE must be taken into account when considering whether the grid operator has the right to deny third party access. These provisions were added to the Energy Law Act through the Amendment Act of 24 July 2002[14]. Pursuant to Article 6(3a) PE "the energy enterprises (…) may suspend the supply of gaseous fuels, electricity or heat if the customer delays the payment for the gaseous fuel, electricity, heat or the services received for at least a month after the due date of payment in spite of a prior written notification of the intention to terminate the agreement and a designation of an additional two-week long term of settlement of the outstanding and current liabilities". Pursuant to Article 6a "an energy enterprise may install a prepayment metering and settlement system used for the settlement of the supply with gaseous fuels, electricity or heat if the customer: 1) has at least twice delayed the payment for the gaseous fuel, electricity or heat or the services received for a period of at least one month within 12 subsequent months, 2) does not have a legal title to the real estate, installation or premises to which the gaseous fuels, electricity or heat is supplied, or 3) uses the real estate, installation or premises in a way that renders regular inspections of the metering and settlement system impossible". The Supreme Court has delivered a clear statement that these provisions exclude the application of Article 490 KC under the specified conditions. Financial difficulties *ex parte* potential customers do not justify therefore a grid access

[9] Ch. Stothers, "Refusal to Supply as Abuse of A Dominant Position: Essential Facilities in the European Union", (2001) 22(7) E.C.L.R 260.

[10] Decision of the European Comission 92/213 *British Midland v. Aer Lingus* (OJ 1992 L 96/34).

[11] J. Majcher, *Dostęp do urządzeń kluczowych w świetle orzecznictwa antymonopolowego* [*Access to essential facilities in the light of antitrust case-law*], Warsaw 2005, p. 108.

[12] A. Walaszek-Pyzioł, *Energia*…, p. 152; J. Baehr, E. Stawicki, *Prawo*…, p. 47.

[13] A. Walaszek-Pyzioł, *Energia*…, p. 154; H. Palarz, *Prawo*…, Article 7.

[14] See Article 1 No. 6 and 7 Act of 24 July 2002 amending the Energy Law Act, Journal of Laws 2002 No. 135, item 1144.

denial "in advance". They only justify the suspension of transmission services *ex post* provided that the requirements contained in Article 6(3a) are fulfilled.

The judgment under consideration here carries great significance for the application of Polish energy law and especially for the determination of what "economic" reasons sufficiently justify third party access denial. According to the judgment of the Supreme Court, general rules of civil law concerning the performance of contractual obligations are restricted by the provisions contained in the energy law regime. Nevertheless, the question remains open whether other reasons of an "economic" nature, as were recognized within the framework of the "essential facilities doctrine", may sufficiently justify a denial of grid access.

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