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ORDER FOR THE CONTINUATION OF ECONOMIC ACTIVITY BY AN ENERGY COMPANY IN THE SOCIAL INTEREST

Abstract

Article 40 of the Energy Law Act of 10 April 1997 provides for the possibility for the President of the Energy Regulatory Office to order the continuation of economic activity by an energy company despite the expiry of a license. This is a special regulation related to the need to ensure the continuity of supplies and protection of recipients of energy services when required by social interest. Therefore, this regulation provides for an exception to the principle of the freedom to undertake, perform, and terminate economic activity.

The purpose of this article is to draw attention to the fact that the necessity to ensure the provision of energy services in a continuous manner means that the state imposes an obligation on energy companies to continue economic activity, at the same time not guaranteeing the entrepreneurs sufficient compensation in the form of appropriate remuneration for continuing the economic activity. Pursuant to the provisions of the Energy Law Act of 10 April 1997, an energy company is only entitled to loss coverage and only in the amount limited to the justified costs of the ordered activity.

KEYWORDS

energy company, social interest, President of the Energy Regulatory Office

SŁOWA KLUCZOWE

przedsiębiorstwo energetyczne, interes społeczny, Prezes Urzędu Regulacji Energetyki

1. INTRODUCTION

Economic rationing is one of the basic functions of the state. It ensures the functioning of the economy in accordance with the public interest. The essence of rationing is the presence in the legal order of a number of instruments (orders and prohibitions) towards entrepreneurs, characterized by varying degrees of formalism and the onerousness of public law interference. One of them is, undoubtedly, the order for an energy company to continue its economic activity despite the expiry of a license.

The purpose of this article is to draw attention to the fact that the need to ensure the provision of energy services in a continuous manner causes the state to impose various public law obligations on energy companies, including the obligation to continue economic activity, at the same time not guaranteeing the entrepreneur sufficient compensation in the form of appropriate remuneration for continuing the economic activity.

In order to perform an analysis in this respect, it is first necessary to present the nature, subjective, and temporal scope, as well as the form of the order to continue economic activity by an energy company. Subsequently, considerations will be made on the powers of an energy company to obtain compensation from the State Treasury for losses incurred as a result of continuing operations. This article will also present the practice of the public administration body – the President of the Energy Regulatory Office – when using the order regulated in Article 40 of the Energy Law Act of 10 April 1997.[1]

[1] Journal of Laws of the Republic of Poland: Journal of Laws 2022, item 1385, as amended.

2. THE ORDER TO CONDUCT ECONOMIC ACTIVITY – ESSENCE, SCOPE, AND FORM

2.1. SOCIAL INTEREST AS A PREREQUISITE FOR CONTINUING ECONOMIC ACTIVITY

The principle of freedom of economic activity adopted in the Constitution of the Republic of Poland covers undertaking, performing, as well as terminating economic activity. Whereas restrictions on this principle are permissible only by way of an act and only on the grounds of an important public interest (Art. 22 of the Constitution of the Republic of Poland).

Article 40 of the Energy Law Act of 10 April 1997 introduces the possibility of restricting the freedom to terminate economic activity of an energy company, if required by social interest. However, the provisions of the Energy Law Act of 10 April 1997, as well as other legal acts, do not specify the scope of the concept of social interest. On the other hand, various definitions of 'social interest' are adopted in the literature. For example, A. Matusiak believes that social interest should lead to the common good by shaping the position of an individual.[2] According to M. Sakowska-Baryła, social interest is related to the existence of certain social groups, the source of which is a diverse society, and with the help of this concept, it is possible to describe other interest groups than those within the public interest.[3] A. Jaworski and A. Komenda claim that social interest is the sum of individual interests but with a reservation that 'the protection of individual, most legitimate interests is not always at the same time the protection of the social interest'.[4] Some authors also identify social interest with public interest, putting an equality sign between them and often using them interchangeably.[5]

Based on the above examples, it can be concluded that there is no fixed and absolute definition for the concept of 'social interest'. Each of the above-mentioned interpretations gives a different picture of this concept. In addition, some of them are inconsistent with each other. Moreover, as M. Wyrzykowski points out, the content of social interest is a constantly changing composition and bal-

[2] A. Matusiak, *Pojęcie interesu społecznego jako przesłanki udziału prokuratora w postępowaniu*, Zeszyty Prawnicze 13.3./2013, p. 152.

[3] M. Sakowska-Była, *Ochrona danych osobowych a dostęp do informacji publicznej i ponowne wykorzystywanie informacji sektora publicznego*, Warszawa 2022, Published: WKP 2022.

[4] A. Jaworski, A. Komenda, Chapter 9. *Kurator ustanawiany w postępowaniu rejestrowym*, (in:) A. Komenda (ed.), *Krajowy Rejestr Sądowy i postępowanie rejestrowe*, Published: WKP 2021.

[5] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2009, p. 358; K. Płonka-Bielenin, *Czynniki decydujące o uregulowaniu prawnym instytucji partnerstwa publiczno-prywatnego w Polsce a interes społeczny*, PPP 2016/7-8, pp. 163-171.

ance of various values of a specific society at a specific time.[6] Thus, the President of the Energy Regulatory Office, when imposing on an energy company the obligation to continue operations after the expiry of a license, must indicate what specific social interest is involved and prove that it is so important and significant that it absolutely requires limiting the individual powers of the energy company. Both the demonstration of social interest and its meaning, as well as the premises may be subject to thorough judicial review, especially when, in the opinion of the authority, it is in the social interest to limit the rights set out in the Constitution of the Republic of Poland.[7]

It should be noted that social interest should not be equated with the concept of 'public interest'. The diverse nature of these legal categories is emphasized by their adjectives. According to the definition included in the PWN Dictionary of the Polish language, the adjective 'public' refers to all people, serving the general public, intended, available to all.[8] In contrast, 'social' means 'relating to a society or part of it, appearing, forming in a society, realized in a society, by a society, connected with a society'.[9] In addition, as some authors point out, 'since a rational legislator distinguished these two terms, it should be assumed that they are not identical and should not be used interchangeably'.[10] As a side note, it should also be noted that the term 'social interest' appears in 3,322 legal acts,[11] in turn, 'public interest' can be found in 10,574 legal acts.[12] However, the above does not mean that these concepts are not correlated categories. Both concepts are the basis for limiting rights and freedoms, and at the same time, they are the limit of the activity of public administration. They are also the opposite of the term 'private' which refers to someone's personal affairs, is someone's personal property, and is not subject to the state or any public institutions.

2.2. SUBJECTIVE SCOPE

The scope of the subjective application of the legal norm contained in Article 40 sec. 1 of the Energy Law Act of 10 April 1997 may apply only to an energy company that held a license to conduct a given type of activity and the license

[6] M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, p. 47.

[7] Z. Muras, *Artykuł 40*, (in:) M. Swora, Z. Muras, (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 589.

[8] M. Szymczak, *Słownik języka polskiego PWN, L–P*, Warszawa 1999, p. 1022.

[9] S. Dubisz, *Wielki słownik języka polskiego PWN, R–T*, Warszawa 2008, p. 500.

[10] A. Matusiak, *Pojęcie interesu społecznego jako przesłanki udziału prokuratora w postępowaniu*, Zeszyty Prawnicze 13.3./2013, p. 163.

[11] Including 3120 sources of local law.

[12] Including 9489 sources of local law.

expired. However, the regulation contained in Energy Law Article 40 of the Act of 10 April 1997 does not specify the grounds (premises) for its expiration.

Issues related to the expiry of the license are regulated in Articles 42-42b of the Energy Law Act of 10 April 1997. Pursuant to them, a license expires as a result of the expiry of the period for which it was issued, on the date of deletion of the energy company from the relevant register or from the records (for reasons other than the death of the entrepreneur), or in the event of a failure to demonstrate or perform the activity covered by the license by the energy company over the next 12 months. A different mechanism is described in Article 162 of the Code of Administrative Procedure Act of 14 June 1960.[13] According to it, a public administration body may declare expiration by way of an administrative decision in two cases. First, when a decision has become groundless and the revocation of such a decision requires a provision of law or when it is in the social interest, or in the interest of the party. Secondly, the decision was issued subject to the fulfillment of a certain condition by the party and the party failed to meet this condition.

When analyzing the above-mentioned legal provisions, it should be stated that it is not possible to order an energy company to continue operating in each case where the license granted by way of an administrative decision expires. In the event of the deletion of the company from the relevant register or records, the legal existence of the energy company ceases and thus the entity that could be ordered to conduct licensed activity ceases to exist. Moreover, as indicated by some authors, taking into account the premises for determining the expiry of the decision pursuant to Article 162 of the Code of Administrative Procedure Act of 14 June 1960 and the fact that this occurs as a result of an action of a public administration body, it is difficult to indicate situations in which it would then be possible to order the performance of licensed economic activity due to social interest in a situation where the same interest is the basis for its termination.[14] The regulation contained in Article 40 sec. 1 of the Energy Law Act of 10 April 1997 therefore may only apply to cases where a license expires as a result of the expiry of the period for which it was granted or as a result of the cessation of activity by an entrepreneur but in a manner other than deletion from the relevant register or records. Thus, one cannot agree with the view of some authors that 'the reason for the expiry of the license is irrelevant'.[15] A *de lege ferenda* request should be made to specify in Article 40 of the Energy Law Act of 10 April 1997 the basis for the expiry of the license.

Article 40 of the Energy Law Act of 10 April 1997 also applies to an entrepreneur who is not the owner of the infrastructure that is to be used to continue oper-

[13] Journal of Laws of the Republic of Poland: Journal of Laws 2022, item 2000, as amended.

[14] Z. Muras, *Artykuł 40*, (in:) M. Swora, Z. Muras, (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 584.

[15] A. Kościuk, *Prawo energetyczne, Komentarz*, ed. II. Published Lex/el.2023, Commentary on Art. 40.

ations,[16] and to an entrepreneur subject to bankruptcy or liquidation proceedings. On the other hand, in the event that bankruptcy is declared, the entity obliged by the President of the Energy Regulatory Office to continue economic activity will be the administrative receiver.[17] However, this standard will not apply to a buyer of a bankrupt enterprise. As indicated by the Supreme Court in one of its judgments, 'the wording of Article 40 sec. 1 of the Energy Law, its unique character and the adopted way of its interpretation preclude its application to third parties who did not hold a license'.[18]

2.3. TIME SCOPE OF THE ORDER

Pursuant to the content of Article 40 sec. 1 of the Energy Law Act of 10 April 1997, the President of the Energy Regulatory Office may order the continuation of economic activity for a period not longer than 2 years. The indicated period shall be calculated from the date of expiry of the license. The designated time scope of the obligation to continue operations should be proportionate to the objective of protecting the specific social interest it is intended to serve. It should be noted that the President of the Energy Regulatory Office may issue multiple decisions ordering the continuation of operations but the total period of extension of all the decisions may not exceed 2 years. Thus, the legislator adopted the principle according to which a 2-year period of compulsory functioning of an energy company should be sufficient to take action by both consumers and other energy companies in order to ensure access to the fuel or energy market.[19]

2.4. FORM OF THE ORDER TO CONTINUE ECONOMIC ACTIVITY

Referring to the legal form of the order to continue operations of an energy company, it should be pointed out that the legislator in Article 40 of the Energy Law Act of 10 April 1997 did not define it directly. However, the doctrine and case law clearly indicate the form of the decision issued on the basis of Article 104

[16] Judgment of the Court of Appeal in Warsaw – VII Commercial Division of 19 April 2018, VII Aga 1285/18, LEX No. 2538277.

[17] It should be noted that case law indicates that 'the administrative receiver should be released from the obligation to conduct activities in the field of trading and distribution of gaseous fuel, since the receiver, within the scope of the function entrusted to him, should aim at satisfying creditors by liquidating the bankrupt's assets, and therefore not to continue operations of the company, only to phase it out, as indicated by the wording of Art. 173 of the Act of 28 February 2003 – Bankruptcy Law.' Judgment of the District Court – Court of Competition and Consumer Protection of 19 September 2017, XVII AmE 185/16, LEX No. 2436806.

[18] Judgment of the Supreme Court of 16 January 2020, I NSK 107/18, LEX No. 3018617.

[19] Z. Muras, *Artykuł 40*, (in:) M. Swora, Z. Muras, (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 585.

§ 1 of the Code of Administrative Procedure Act of 14 June 1960 in connection with Article 40 of the Energy Law Act of 10 April 1997.[20] It should be noted that the decision in question will not be a license within the meaning of Article 32 of the Energy Law Act of 10 April 1997 but only a decision ordering the continuation of a specific licensed activity. It should be noted that the President of the Energy Regulatory Office in the period from 2015 to 2021[21] issued five decisions ordering the continuation of operations after the expiry of a license. In 2016, one decision was issued (which was later overturned in court proceedings), and in 2019, four decisions were issued (including two decisions for one energy company).[22] In 2022 and January 2023, the President of the Energy Regulatory Office, in turn, did not issue any decisions ordering an energy company to continue conducting licensed economic activity despite the expiry of a license, pursuant to Article 40 of the Energy Law Act of 10 April 1997.[23]

3. COVERING THE COMPANY'S LOSSES FOR CONTINUING OPERATIONS

Pursuant to Article 41 sec. 2 of the Energy Law Act of 10 April 1997, an energy company is entitled to loss coverage for continuing economic activity from the State Treasury in the amount limited to the justified costs of the activity specified in the license. If the continued economic activity is not conducted at a loss, the energy company is not entitled to compensation.

Coverage of possible losses of an energy company is also limited to the justified costs of continuing operations. Therefore, the compensation from the State Treasury will cover only the costs related to conducting economic activity in the period from the date of expiry of the license to the date of expiry of the period in which the energy company's economic activity is to be continued, as specified in the decision of the President of the Energy Regulatory Office. Thus, the State Treasury is not liable for losses incurred prior to the issuance of the deci-

[20] Judgment of the Supreme Court of 16th January 2020, I NSK 107/18 , LEX No. 3018617; Z. Muras, *Artykuł 40*, (in:) M. Swora, Z. Muras, (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 589; A. Walaszek-Pyzioł, W. Pyzioł, *Prawo energetyczne, Komentarz*, Wydawnictwo Prawnicze PWN, Warszawa 1999, p. 113.

[21] There is no documented information prior to 2015 due to the five-year period of archiving decisions requiring energy companies to continue conducting activities covered by the license, resulting from the Office Instruction of the Energy Regulatory Office.

[22] Reply of the Energy Regulatory Office to the author's request submitted under the provisions on access to public information. Letter of 29 July 2021, number DSK. WKS.056.54.2021.IRŚ.

[23] Reply of the Energy Regulatory Office to the author's request submitted under the provisions on access to public information. Letter of 8 March 2023, number DSK.WKS.056.19.2023.IRŚ.

sion ordering the continuation of economic activity. In addition, only the costs intended to prevent the energy company from generating losses are subject to approval. The rest of the costs remain unapproved, for example, the cost of energy efficiency certificates in the case of electricity sold to end users.[24]

The possibility of claiming compensation for losses is also closely related to the scope of activity indicated in the decision ordering the continuation of the economic activity. The coverage of losses applies only to the economic activity that the energy company was ordered to perform. As some authors point out, if the decision limits the scope of economic activity in relation to the issued license, it will be possible to cover the justified costs only in the scope of losses resulting from the activity within this limited scope.[25]

On the basis of Article 40 sec. 2 of the Energy Law Act of 10 April 1997, it is also not possible to cover losses resulting from the damage caused by the improper activity of an energy entrepreneur. The above applies in particular to the coverage of any claims for damages arising from torts or for non-performance or improper performance of own obligations.[26] On the other hand, the obligation to cover losses applies only to losses in the scope of justified costs of operations conducted with due diligence. As indicated by some authors, due diligence of an enterprise should result from its professional nature, knowledge, and reliability typically required from an entity for this type of activity.[27]

In accordance with the wording of Article 40 sec. 3 of the Act of 10 April 1997, reasonable costs of activities carried out with due diligence are subject to approval by the President of the Energy Regulatory Office. Thus, losses will be covered by a decision issued by the President of the Energy Regulatory Office. The burden of proof of the loss, its amount, and justified nature will be borne in this case by the entrepreneur requesting its coverage.[28] In addition, as indicated in case law, 'due to the fact that the relations between parties may often be very complicated and the claims arising from them may have a source or basis in various legal provisions, it is the duty of the plaintiff (energy entrepreneur) to precisely define the actual basis of the request so that it can be clearly determined what legal basis it has. This is necessary in order for the defendant to undertake appropriate protection and in order for the court to determine the limits of the resolution of the case'.[29] The entrepreneur may appeal against the decision of the

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[24] Z. Muras, *Artykuł 40*, (in:) M. Swora, *Z. Muras,* (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 591.

[25] Z. Muras, *Artykuł 40*, (in:) M. Swora, *Z. Muras,* (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, pp. 590-591.

[26] A. Walaszek-Pyzioł, W. Pyzioł, *Prawo energetyczne, Komen*tarz, Wydawnictwo Prawnicze PWN, Warszawa 1999, p. 114.

[27] M. Kuliński, *Artykuł 40*, (in:) M. Kuliński (ed.), *Prawo Energetyczne. Komentarz*, Warszawa 2017.

[28] *Ibid*.

[29] Judgment of the Supreme Court of 11 December 2009, V CSK 180/09, LEX No. 551156.

President of the Energy Regulatory Office to the District Court in Warsaw – the Court of Competition and Consumer Protection – pursuant to Article 30 sec. 2 of the Energy Law Act of 10 April 1997.

4. CONCLUSION

The considerations presented above lead to the following conclusions:

1. The need to guarantee the provision of energy services in a continuous manner means that the state may impose an obligation on an energy company to continue its economic activity despite the expiry of a license. This allows not only for the permitted limitation of the freedom to conduct economic activity but also rationing control over the economic activity of energy companies.
2. An order to continue economic activity by an energy company may only be made when it is required by social interest. Taking into account the fact that the concept of social interest is a general clause, its content will be specified each time by the President of the Energy Regulatory Office in a specific case. The scope of this concept is conditioned by many variables and requires constant updating and reference to specific factual and legal relations in a given place, time, and value system.
3. It is not possible to order an energy company to continue its economic activity in every case in which a license expires. The regulation contained in Article 40 sec. 1 of the Energy Law Act of 10 April 1997, therefore, may only apply to cases where a license expires as a result of the expiry of the period for which it was granted or as a result of the cessation of economic activity by an entrepreneur but in a manner other than deletion from the relevant register or records. A *de lege ferenda* request should be made to specify in Article 40 of the Energy Law Act of 10 April 1997 the basis for the expiry of the license.
4. The subjective scope of application of the legal norm contained in Article 40 sec. 1 of the Energy Law Act of 10 April 1997 may apply to an energy company. However, in the event of bankruptcy, the entity obliged by the President of the Energy Regulatory Office to continue conducting economic activity will be the administrative receiver. *De lege ferenda* request should be made for exemption from the obligation to conduct economic activities by the administrative receiver due to the fact that the role of the receiver mainly involves liquidating the assets of a bankrupt entrepreneur and determining the circle of creditors who will be repaid in the course of bankruptcy proceedings.
5. The legal regulation contained in Article 40 of the Energy Law Act of 10 April 1997 is applied in the practice of the public administration body – the President of the Energy Regulatory Office.
6. The provision of Article 40 sec. 2 of the Energy Law Act of 10 April 1997 defines the upper maximum limit of the State Treasury's liability. An energy

company is entitled to loss coverage in the amount limited to the justified costs of the ordered activity. The entrepreneur is not entitled to any other costs that may be necessary for the effective continuation of economic activity. He is also not entitled to any additional compensation in the form of appropriate remuneration for continuing his economic activity.

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