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## **THE ROLE OF PUBLIC SECTOR ENTITIES IN IMPROVING ENERGY EFFICIENCY – CHARACTERISTICS OF ENERGY PERFORMANCE CONTRACTS**

### **Abstract**

Improving energy efficiency is one of the EU's key actions to mitigate climate change. The public sector is expected to play a key role in the fight against climate change. Therefore, it is useful to describe the role of public sector entities in improving energy efficiency and the legal tools they can use for this purpose. One such tool is the energy performance contract. In this article, the characteristics of normative and non-normative acts adopted at EU and national levels in the field of energy efficiency have been identified. It also analyses the provisions on energy performance contracts in order to show what such a contract is and how its essential elements should be designed. The identification of the fundamental problems arising from the current provisions on the conclusion of energy performance contracts will contribute to the possibility of redesigning these provisions or creating new legal frameworks in a way that better responds to the needs of market participants.

### **KEYWORDS**

energy efficiency, energy performance contract, public sector entities

## SŁOWA KLUCZOWE

efektywność energetyczna, umowa o poprawę efektywności energetycznej, jednostki sektora publicznego

## 1. INTRODUCTION

The fight against current climate change can take several forms. One of them is the implementation of measures to improve energy efficiency. The inspiration for writing this article and addressing the issues related to energy efficiency came from the statement in national and EU documents that the public sector should play a key role in improving energy efficiency, both at the local, regional and national levels. Therefore, if the public sector is to set the direction in the field of energy efficiency, it is necessary to provide it with appropriate tools to achieve this goal. The analysis of the following documents and legal acts dealing with the issue of energy efficiency led to the introduction of the model of financing energy efficiency improvement projects based on an energy performance contract. An energy performance contract can be one of the tools with which public sector bodies can fulfil the role to which they have been appointed by the provisions of EU and national law. For these reasons, this article has attempted to characterise these contracts and highlight the main problems related to their conclusion on the Polish market. It should be noted that the model of implementing investments on the basis of energy performance contracts is popular and has been used for many years by entities operating in the private sector. Therefore, it is even more worthwhile to consider why this model is still rarely chosen by public sector entities.

The first part of the article explains what energy efficiency is and how it has been regulated at EU and national levels. In addition to describing the legislative changes, this part also contains an analysis of those acts dealing with energy efficiency which, although not of a normative nature, have a significant influence on the content of the adopted directives, laws and regulations. This introduction to the subject of energy efficiency is intended to show the importance and growing impact of energy efficiency on the development of the EU and national energy sectors.

The focus of the next part of this article is to analyse the individual elements that make up the content of Article 7 of the Polish Energy Efficiency Act. Getting acquainted with the concepts used by the Polish legislator in this provision is crucial for identifying some of the problems related to the conclusion of energy performance contracts. The analysis of this provision will also facilitate the understanding of the principles of concluding energy performance contracts.

The fourth point of this article is the proper analysis of energy performance contracts. It should be noted, however, that this analysis by no means exhausts the range of issues related to such contracts. In this article, the description has been limited to the problems related to the subjectively essential elements of these contracts, i.e. their parties and the obligations that are based on them, as well as the risks that result from the fulfilment of these obligations. It should also be noted that the issue of concluding energy performance contracts can be described as interdisciplinary. It is influenced by various legal acts, not only those related to climate change or energy law but also those related to public procurement or public-private partnerships. For these reasons, this article does not deal with all the issues related to the conclusion and interpretation of energy performance contracts.

## **2. ENERGY EFFICIENCY IN EU AND NATIONAL LEGISLATION**

In the last years, improving energy efficiency has become an issue of crucial importance. The European Union has adopted a number of legal acts and strategies to promote energy efficiency measures, which in turn have contributed to the implementation of these regulations in the national legislation of individual Member States, including Poland. The aim of this part of the article is to show how the EU's energy efficiency objectives have been and are still being shaped, and how their constant evolution affects Polish legislation in this area.

### **2.1. EU LEGISLATION**

The Treaty on the Functioning of the European Union<sup>1</sup> (hereinafter: TFEU) is undoubtedly the starting point for analysing EU legislation on energy efficiency. It contains the basic objectives of the EU's energy policy, including the promotion of energy efficiency and energy savings (Article 194(1)(c) TFEU). The subsequent part of this provision establishes the obligation of the EU institutions to establish legal measures necessary to achieve this objective, as well as the other objectives listed in this article (Article 194(2) TFEU).

The consequence of fulfilling the above obligation was the adoption of the Energy Efficiency Directive<sup>2</sup> in 2012 (hereinafter: Directive 2012/27/EU). Direc-

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<sup>1</sup> The Treaty on the Functioning of the European Union (Official Journal 2004, No. 90, item 864/2 as amended).

<sup>2</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (Official Journal EU L 2012, No. 315 as amended).

tive 2012/27/EU required each EU Member State to set national indicative energy efficiency targets and also set the EU's overall target of increasing energy efficiency by 20% by 2020.

Over the years, the European Union has started to take measures that have led to the identification and implementation of increasingly ambitious objectives that shape the EU's energy policy, with a particular focus on aspects related to climate change.<sup>3</sup> In 2018, the European Commission proposed a review of the provisions of Directive 2012/27/EU. As a result of this review, the Regulation on the Governance of the Energy Union and Climate Action<sup>4</sup> (hereinafter: Regulation 2018/1999) and the Directive amending Directive 2012/27/EU on energy efficiency<sup>5</sup> (hereinafter: Directive 2018/2002) were adopted in December 2018. As a result of the adoption of the above-mentioned legal acts, the energy efficiency target stated in Directive 2012/27/EU has been clarified – it assumes a reduction of primary and final energy consumption to the level of 32.5% by 2030 compared to the energy consumption projections for 2030 prepared in 2007.

Regulation 2018/1999 and Directive 2018/2002 transpose into legislation the “energy efficiency first” principle first communicated in 2016 as part of the “Clean Energy for all Europeans” package.<sup>6</sup> This principle requires energy efficiency to be treated not only as one of the objectives of EU energy policy but also as a full-fledged energy source in which both public and private entities can invest before investing in more costly and complex energy sources.<sup>7</sup> The “energy efficiency first” principle was then clarified in the European Commission's 2021 Recommendations,<sup>8</sup> which provide examples of its implementation in the decision-making process, mainly in the energy sector.

<sup>3</sup> T. Skoczkowski, S. Bielecki, *Efektywność energetyczna – polityczno-formalne uwarunkowania rozwoju w Polsce i Unii Europejskiej*, *Polityka Energetyczna – Energy Policy Journal* 2016, Vol. 19, Note 1, p. 9.

<sup>4</sup> Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council (Official Journal EU L 2018, No. 328 as amended).

<sup>5</sup> Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency (Official Journal EU L 2018, No. 328).

<sup>6</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions, and the European Investment Bank, *Clean energy for all Europeans*, Brussels 2016.

<sup>7</sup> See: [https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficiency-targets-directive-and-rules/energy-efficiency-first-principle\\_pl?ettrans=pl](https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficiency-targets-directive-and-rules/energy-efficiency-first-principle_pl?ettrans=pl) (accessed 20 August 2023).

<sup>8</sup> Commission Recommendation (EU) 2021/1749 of 28 September 2021 on Energy Efficiency First: from principles to practice – Guidelines and examples for its implementation in decision-making in the energy sector and beyond.

The European Union did not stop at the above-mentioned changes in the climate objectives in the field of energy efficiency and proposed two further reviews of the provisions of Directive 2012/27/EU. These were linked to the adoption of the “Fit for 55” package in July 2021<sup>9</sup> and the “REPowerEU” plan<sup>10</sup> in May 2022. The first of these strategies aimed to increase energy efficiency in relation to primary and final energy consumption to 39% and 36% respectively by 2030. REPowerEU, on the other hand, set the above targets at 41% and 39% respectively. At the beginning of 2023, the Council of the European Union and the European Parliament reached a preliminary agreement on the new energy efficiency target, setting it at 11.7% compared to the energy consumption forecasts for 2030 prepared in 2020 (compared to the 2007 forecasts, this level is therefore 40.5% for primary energy consumption and 38% for final energy consumption).<sup>11</sup> The above provisions were confirmed by the Council of the European Union on 25 July with the adoption of the amended version of Directive 2012/27/EU.<sup>12</sup> Following publication in the Official Journal of the European Union, the new energy efficiency rules will enter into force after 20 days.<sup>13</sup>

## 2.2. NATIONAL LEGISLATION

The issues related to energy efficiency in the Polish legal system were mainly regulated by the Act of 20 May 2016 on Energy Efficiency<sup>14</sup> (hereinafter: the Energy Efficiency Act). This Act replaced the previous Act of 15 April 2011 on energy efficiency due to the need to transpose the provisions of Directive 2012/27/EU into Polish law.

The Energy Efficiency Act introduces a legal definition of energy efficiency, according to which it is the ratio of the amount of the utility effect obtained by a given object, technical device or installation in typical conditions of its use, or operation to the amount of energy consumed by this object, technical device or installation, or as a result of the performed service necessary to obtain this effect (Art. 2, point 3 of the Energy Efficiency Act). The term “utility effect” used in

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<sup>9</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *“Fit for 55”: delivering the EU’s 2030 Climate Target on the way to climate neutrality*, Brussels 2021.

<sup>10</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *REPowerEU Plan*, Brussels 2022.

<sup>11</sup> See: <https://www.europarl.europa.eu/news/pl/press-room/20230309IPR77212/parliament-and-council-negotiators-agree-on-new-rules-to-boost-energy-savings> (accessed 20 August 2023).

<sup>12</sup> See: <https://www.consilium.europa.eu/pl/press/press-releases/2023/07/25/council-adopts-energy-efficiency-directive/> (accessed 20 August 2023).

<sup>13</sup> See: <https://www.cire.pl/artykuly/serwis-informacyjny-cire-24/rada-ue-przyjela-dyrektywe-o-efektywnosci-energetycznej> (accessed 20 August 2023).

<sup>14</sup> Consolidated text: Journal of Laws of 2021, item 2166.

the above definition is in turn defined as the effect obtained as a result of the energy supply to a given object, technical device or installation, in particular, the performance of mechanical work, thermal comfort or lighting (Article 2(4) of the Energy Efficiency Act).

In order to better understand the concept of energy efficiency, it is worth applying the simplification proposed by M. Porzeżyńska, according to which energy efficiency is the ratio of utility effect to energy consumption. Consequently, energy efficiency can be designed on two levels: by increasing the utility effect with the same energy consumption (e.g. lighting a larger number of rooms with the same amount of energy), or by reducing energy consumption while maintaining the same utility effect (e.g. maintaining the same temperature in a room while reducing the fuel consumption necessary to heat that room).

Energy consumption itself can also be considered in two ways. The first is the typical energy consumption of a given object, technical device or installation. The second refers to the energy consumed as a result of performing a service necessary to achieve a specific utility effect. The extension of the concept of energy efficiency to include the second of the above-mentioned aspects was made on the basis of the current Energy Efficiency Act and has significant implications in the context of concluding energy performance contracts. The provision of specific services that affect energy consumption is the essence of such contracts.

However, the Energy Efficiency Act is not the only act containing provisions on energy efficiency. For example, the law of 29 August 2014 on the energy performance of buildings<sup>15</sup> or the law of 21 November 2008 on the promotion of thermal modernisation and renovation and on the central register of emissions from buildings.<sup>16</sup>

The above-mentioned acts can be described as legal acts of a specific nature. However, the issue of energy efficiency also falls within the scope of a legal act of a systemic nature, which in the Polish legal system can be considered to be the Act of 10 April 1997 – the Energy Law<sup>17</sup> (hereinafter: Energy Law).<sup>18</sup> One of the objectives of this Act is to ensure the economical and rational use of fuels and energy (Article 1(2) of the Energy Law). Therefore, energy efficiency is not a directly identified category under the Energy Law. This is emphasised by Z. Muras and M. Swora, among others, who also point out that the legislator's specification of the objective of ensuring the economical and rational use of fuels and energy (which is undoubtedly related to the concept of energy efficiency) highlights the

<sup>15</sup> Consolidated text: Journal of Laws of 2021, item 497.

<sup>16</sup> Consolidated text: Journal of Laws of 2022, item 438.

<sup>17</sup> Consolidated text: Journal of Laws of 2022, item 1385.

<sup>18</sup> A. Kościuk, *Prawo energetyczne. Komentarz*, 2nd Edition, Article 1.

specificity of the axiology characteristic of the Energy Law while maintaining the consistency of the content of this act with the specific provisions.<sup>19</sup>

When talking about energy efficiency, it should be emphasised that the issues related to it go beyond the sphere of purely normative acts. An example of this is the Energy Policy of Poland until 2040,<sup>20</sup> a key document of a strategic nature, which sets the directions for the development of the national energy sector (hereinafter: PEP 2040). The legal basis for the adoption of the national energy policy is the Energy Law, of which Article 13 lists the objectives of this policy. These include ensuring the growth of the competitiveness and energy efficiency of the economy. Similarly to the objectives of the Energy Law itself, the improvement of energy efficiency in the Polish legal system does not function as an objective in its own right, but as a means to achieve other objectives. The authors of the PEP 2040, sharing the above interpretation, point out that the improvement of energy efficiency has a horizontal and cross-cutting character and should be taken into account when implementing other measures listed in the remaining specific objectives of the PEP 2040.<sup>21</sup>

However, improving energy efficiency is not only a matter of sustainable use of fuels and energy or contributing to the better functioning of the Polish economy. The authors of the PEP 2040 point out that it indirectly contributes to ensuring the country's energy security "by reducing the demand for fuels and energy and the import of raw materials".<sup>22</sup>

The above interpretation is reflected in the assumptions for the update of the PEP 2040, published at the end of March 2023 by the Office of the Prime Minister under the title "Strengthening security and energy independence".<sup>23</sup> The need to update the PEP 2040 is dictated by the current geopolitical situation, including the war in Ukraine, the embargo on fuels from Russia and a significant increase in energy prices. As part of the assumptions, it is proposed to base the Polish energy policy on another, fourth pillar, namely energy sovereignty. This sovereignty, along with technological diversification and capacity expansion based on domestic sources, the development of renewable energy sources or the use of nuclear energy, consists precisely in improving energy efficiency. This will reduce the electricity demand, which in turn will reduce the demand for certain raw materials and decrease the impact on society and the economy of possible

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<sup>19</sup> Z. Muras, M. Swora, *Prawo energetyczne. Tom I. Komentarz do art. 1-11s*, Z. Muras, M. Swora (eds.), 2nd Edition 2, Article 1.

<sup>20</sup> Announcement of the Minister of Climate and Environment of 2 March 2021 on the national energy policy until 2040 (Official Journal of 2021, item 264).

<sup>21</sup> *Ibidem*, p. 75.

<sup>22</sup> *Ibidem*, p. 75.

<sup>23</sup> See <https://www.gov.pl/web/premier/zalozenia-do-aktualizacji-polityki-energetycznej-polski-do-2040-r-pep2040--wzmocnienie-bezpieczenstwa-i-niezaleznosci-energetycznej> (accessed 19 August 2023).

interruptions in the supply of electricity (the so-called blackouts).<sup>24</sup> The update of the PEP 2040 is therefore a document that is eagerly awaited by many, including businesses, local authorities and citizens themselves. However, according to industry sources, the expected update of the PEP 2040 could take place at the turn of 2023 and 2024.<sup>25</sup>

### 3. THE ROLE OF PUBLIC SECTOR ENTITIES IN IMPROVING ENERGY EFFICIENCY

According to the Energy Efficiency Act, a public entity may implement and finance a project or similar projects aimed at improving energy efficiency on the basis of an energy performance contract (Art. 7 para. 1 of the Energy Efficiency Act). A detailed explanation of the meaning of the quoted provision requires a deeper analysis due to its key importance in the context of the issues discussed in this article.

#### 3.1. A PUBLIC SECTOR ENTITY

The Energy Efficiency Act defines a public entity by referring to Article 4 of the Act of 11 September 2019 – Public Procurement Law<sup>26</sup> (hereinafter: Public Procurement Law). The cited article introduces a catalogue of entities that are considered to be contracting entities to which the provisions of the Public Procurement Law apply. The above-mentioned catalogue includes (i) public financial sector entities within the meaning of the provisions of the Act of 27 August 2009 on Public Finances<sup>27</sup> (hereinafter: Public Finances Act), (ii) state organisational units without legal personality which do not belong to the public financial sector entities, (iii) the so-called public law entities which do not belong to the public financial sector entities and (iv) associations of entities mentioned in the previous points.

Due to the subject matter of this article, the legal issues associated with the classification of certain entities as contracting authorities will not be examined in detail. However, it is worth mentioning some examples of these entities, as this

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<sup>24</sup> *Ibidem*, p. 2.

<sup>25</sup> See: <https://swiatoze.pl/aktualizacji-pep2040-nie-bedzie-a-przynajmniej-nie-za-kadencji-tego-rzadu/> (accessed 19 August 2023).

<sup>26</sup> The Act on energy efficiency refers in this provision to the wording of the Public Procurement Law of 2021 with subsequent amendments – Journal of Laws 2021, items 1129 and 1598.

<sup>27</sup> Consolidated text: Journal of Laws of 2023, item 1270.

may prove helpful in understanding which of them can potentially become parties to energy performance contracts.

The first group includes entities that constitute the public finance sector in Poland. They are listed in Article 9 of the Public Finances Act and include, among others, public authorities, local government units, the Social Insurance Fund (*Zakład Ubezpieczeń Społecznych*), the National Health Fund (*Narodowy Fundusz Zdrowia*) and the Polish Academy of Sciences (*Polska Akademia Nauk*). Examples of entities included in the following categories are given, *inter alia*, by A. Gawrońska-Baran, who states that the second category includes the State Forests (*Państwowe Gospodarstwo Leśne Lasy Państwowe*), the third category includes entities such as the National Bank of Poland, State Television and Radio, while the fourth category is made up of associations of the above entities, for which the legislator has not provided a specific legal form.<sup>28</sup>

The above distinction shows that the intention of the legislator was to cover a possibly wide group of entities with the category of public sector entities. This is evidenced, for example, by the use of the term “public sector entity” in the Energy Efficiency Act and not “public finance entity”, which would automatically limit the scope of this term to the entities listed in Article 9 of the Public Finance Act.

### 3.2. A PROJECT SERVING TO IMPROVE ENERGY EFFICIENCY

Another term used in Article 7 of the Energy Efficiency Act which deserves more attention, is a project to improve energy efficiency. This term has been defined in the Energy Efficiency Act as an action consisting in making changes or improvements to an object, technical device or installation as a result of which energy savings are achieved (Article 2 item 12 of the Energy Efficiency Act). The catalogue of energy efficiency improvement projects is listed in Article 19 of the Energy Efficiency Act. These include, for example: insulation of industrial equipment, reconstruction or renovation of a building, modernisation or replacement of lighting, energy recovery and the use of energy generated in renewable energy installations. The list of energy efficiency projects was also determined on the basis of the announcement of the Minister of Climate and Environment of 30 November 2021.<sup>29</sup> However, energy efficiency improvement contracts are mentioned only once in the above-mentioned announcement. In Section 2 point 10 of the announcement, it was only stated that a project for improving energy efficiency is the reconstruction or renovation of a public utility building on the basis of an energy performance contract. At this point, it is worth mentioning the

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<sup>28</sup> E. Wiktorowska, A. Wiktorowski, P. Wójcik, A. Gawrońska-Baran, *Prawo zamówień publicznych. Komentarz aktualizowany*, 2023, Article 4.

<sup>29</sup> Official Gazette of the Government of the Republic of Poland (Monitor Polski) 2021, item 1188.

first problem related to the conclusion of energy performance contracts in Poland. The indication that they can only be concluded in the context of the reconstruction or renovation of a public utility building significantly limits the scope of potential projects that could be implemented using such contracts.

An energy efficiency project should not be confused with the concept of an energy efficiency measure, which has a broader scope than the project itself. Article 6(2) of the Energy Efficiency Act introduced a catalogue of such measures. The lack of use of expressions such as “in particular” or “others not mentioned in this article” in this catalogue indicates that it is a closed catalogue. Thus, the Polish legislator considers the following as measures to improve energy efficiency: (i) implementation and financing of a project to improve energy efficiency, (ii) purchase of equipment, installations or vehicles characterised by low energy consumption and low operating costs, (iii) replacement of the equipment, installations or vehicles in use with the equipment, installations or vehicles referred to in point (ii) or their modernisation, (iv) implementation of a thermal modernisation project, (v) implementation of an environmental management system and (vi) implementation of low-emission projects.

It is, therefore, necessary to compare the content of Article 6(2)(1) with the wording of Article 7(1) of the Energy Efficiency Act. After comparing these two articles, it is possible to reformulate the second of these provisions as follows: A public entity may apply an energy efficiency improvement measure referred to in Article 6(2)(1) on the basis of an energy performance contract. The proposed amendment of this provision shows that the Polish legislator has already limited the scope of energy efficiency measures implemented on the basis of an energy performance contract at the level of the terms used in the provisions. Therefore, it is worth considering why an energy performance contract cannot be concluded for the purpose of applying other energy efficiency measures as well. Such a regulation, which is present in the current wording of the Energy Efficiency Act, seems to be inconsistent not only with the EU perspective but also with the intentions of the legislator himself.

The use of the phrase “a project or projects of the same type” in Article 7 of the Energy Efficiency Act is problematic for reasons similar to those described in the previous paragraph. It suggests that an energy performance contract may cover either a single project (such as the upgrading of a specific public utility building) or several projects but only those of the same type. For example, it is possible to conclude an energy performance contract for a project covering the entire municipality but only in the context of the replacement of street lighting. The above approach, which can be seen in the cited regulation, is, for example, inconsistent with market practice, according to which energy performance contracts can serve as a basis for the implementation of various projects aimed at improving energy efficiency (e.g. a contract covering the modernisation of building management systems as well as the installation of PV panels).

## 4. ENERGY PERFORMANCE CONTRACT

As regards the most important element of this article for the purposes of Article 7 of the Energy Efficiency Act, it is necessary to quote the legal definition of an energy performance contract introduced by Directive 2012/27/EU. According to this definition, an energy performance contract is an agreement between the beneficiary and the provider of an energy efficiency improvement measure, which is verified and monitored throughout the duration of the contract, where investments (works, supplies or services) in this measure are paid for in relation to a contractually agreed level of energy efficiency improvement or another agreed energy performance criterion, such as financial savings (Article 2(27) of Directive 2012/27/EU).

It should be noted that the Energy Efficiency Act does not provide its own definition of an energy performance contract. Therefore, when discussing the individual elements of such a contract, it is necessary to refer directly to the definition contained in Directive 2012/27/EU. It should be emphasised that there are discrepancies between the terminology used in Directive 2012/27/EU and the terminology used in the Energy Efficiency Act (most likely due to the limitations of translating), which may pose a challenge in interpreting the individual legal norms regulating the conclusion of such contracts.

However, it should be noted that the provisions of Directive 2012/27/EU and the Energy Efficiency Act will be helpful in understanding what energy performance contracts are and how they should be structured. Further analysis of these contracts will be based on the contents of the Guide to the Statistical Treatment of Energy Performance Contracts, prepared by Eurostat and the European Investment Bank in May 2018<sup>30</sup> (hereinafter: the Guide), and the Guidelines for Energy Performance Contracts, prepared by the Ministry of Climate and Environment in March 2023<sup>31</sup> (hereinafter: the Guidelines).

### 4.1. PARTIES TO THE ENERGY PERFORMANCE CONTRACT

According to the definition in Directive 2012/27/EU, the parties to an energy performance contract are the beneficiaries and the providers of an energy efficiency improvement measure. It should be noted that Directive 2012/27/EU does not define any of the above terms. On the other hand, according to the Energy Efficiency Act, the parties to such a contract are public entities (whose issues

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<sup>30</sup> *A Guide to the Statistical Treatment of Energy Performance Contracts*, Eurostat and European Investment Bank, 2018.

<sup>31</sup> *Guidelines for Energy Performance Contracts (Wytyczne do umów o poprawę efektywności energetycznej)*, Ministry of Climate and Environment, 2023.

have already been addressed in the previous part of the article) and providers of services related to energy consumption. Article 7(4) of the Energy Efficiency Act states that such a provider is an entity, including an entity with its registered office or place of residence outside the territory of the Republic of Poland, which provides services consisting in the implementation of projects aimed at improving energy efficiency.

However, regardless of the terminology used in Directive 2012/27/EU and the Energy Efficiency Act, such providers are commonly referred to as ESCOs (an acronym for Energy Saving Company or Energy Service Company)<sup>32</sup> and will be referred to as such in the following parts of this article.

It is worth noting that the Energy Efficiency Act does not specify whether another public entity (or another entity operating within the public sector that is not a public entity) can be an ESCO company. The provisions of Directive 2012/27/EU, which, as mentioned above, do not define the terms “beneficiary” and “provider of an energy efficiency improvement measure”, will not be helpful in this respect either. However, the Guidelines state that the concept of an ESCO company corresponds to the definition of a “contractor” contained in Article 7(30) of the Public Procurement Law.<sup>33</sup> However, the doctrine emphasises that the scope of the term “contractor” should be interpreted as broadly as possible, regardless of the legal form that the entities that are contractors have chosen for the purpose of carrying out their activities.<sup>34</sup>

The answer to the question posed in the previous paragraph is of fundamental importance from the perspective of the risks borne under the energy performance contract (which will be described in the further part of this article). However, for the purposes of this section, it is necessary to refer to the content of the Guide, which indicates that, from the perspective of the statistical recording of energy performance contracts, an ESCO company should be classified outside the government and local government sector<sup>35</sup> (for simplicity’s sake, outside the public sector). According to the Guidelines, in order to verify such a classification, it is first necessary to check whether a given ESCO is controlled by the public sector. Control is undoubtedly a broad concept and its existence should be determined on a case-by-case basis. However, the authors of the Guide indicate that control means, *inter alia*, (i) the public sector holding 51% of the shares and voting rights in the ESCO company, (ii) the public sector holding 25% of the shares in the ESCO company, which gives the public sector the right to veto significant deci-

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<sup>32</sup> The catalogue of entities offering services related to energy consumption on the Polish market is available at the following link <https://www.gov.pl/web/klimat/lista-dostepnych-dostawcow-uslug-energetycznych> (accessed 16 September 2023).

<sup>33</sup> *Guidelines...*, p. 119.

<sup>34</sup> E. Wiktorowska, A. Wiktorowski, P. Wójcik, A. Gawrońska-Baran, *Prawo zamówień publicznych...*, Article 7.

<sup>35</sup> *A Guide...*, p. 21.

sions of the ESCO company, and (iii) where the public sector does not hold any shares in the ESCO company, having the right to veto significant decisions of the ESCO company, for example on the basis of an agreement on the financing of a particular ESCO company.

## 4.2. THE OBLIGATIONS OF THE ESCO COMPANY IN THE ENERGY PERFORMANCE CONTRACT

The main obligation of the ESCO company is to implement a project serving to improve energy efficiency. As indicated in the Guidelines, the ESCO company must provide a comprehensive investment approach to the implementation of a given project, which means designing, financing, performing construction works, ensuring adequate supplies and services, etc.<sup>36</sup>

The main obligation of the ESCO company is to implement a project to improve energy efficiency. As stated in the guidelines, the ESCO company has to provide a comprehensive investment approach to the implementation of a given project, i.e. design, financing, construction, ensuring adequate supplies and services, etc.<sup>37</sup>

According to Article 7(2)(1) of the Energy Efficiency Act, the implementation of an energy efficiency improvement project must contribute to the achievement of specific energy savings. The energy saving is the amount of energy that constitutes the difference between the energy potentially consumed by a given object (device or installation) in a given period before the implementation of the project serving to improve energy efficiency and the energy consumed by this object (device or installation) in the same period after the implementation of this project, taking into account the normalised external conditions affecting energy consumption (Article 2(10) of the Energy Efficiency Act). For this reason, energy performance contracts are also called contracts with guaranteed savings.<sup>38</sup>

Thus, on the basis of the energy performance contract, the ESCO company is obliged to (i) implement the investment process for the construction of a specific project and (ii) guarantee the specified energy savings achieved as a result of the process referred to in point (i). Looking at these obligations, it should be noted that their implementation is burdened with various types of risks. It should also be emphasised that the construction risk should be understood in a broader sense than just the risk of carrying out construction works within the meaning of the

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<sup>36</sup> *Guidelines...*, p. 18.

<sup>37</sup> *Guidelines...*, p. 18.

<sup>38</sup> See: <https://kape.gov.pl/epc-esco> (accessed 16 September 2023).

provisions of the Polish Building Law.<sup>39</sup> This risk is also related to the implementation of all investments aimed at improving energy efficiency.<sup>40</sup>

As already indicated in the previous part of the article, the determination of which party to the energy performance contract is obliged to bear these risks is a key issue for the popularity of concluding such contracts on the Polish market. It should be noted that one of the main reasons why Polish public entities were reluctant to enter into such contracts was the fact that the issue of ESCOs bearing the risks for their obligations was not sufficiently regulated in Polish law. It is also noted that the lack of an appropriate regulatory environment in this respect was one of the main barriers to the use of energy performance contracting in Poland.<sup>41</sup>

In particular, the Energy Efficiency Act did not specify whether and to what extent the obligations arising from energy performance contracting affect the level of public debt and the deficit of the public finance sector. However, this ambiguity was clarified by the adoption of the amendment to the Energy Efficiency Act in 2021,<sup>42</sup> which added Section 3 to Article 7. According to this provision, the obligations arising from the energy performance contract do not affect the level of public debt and the deficit of the public finance sector if the ESCO company bears most of the construction risk and the risk of achieving the guaranteed energy savings.

This regulation was then further clarified by the adoption of the Regulation of the Minister of Funds and Regional Policy of 22 December 2021 on the scope of the construction risk and the risk of achieving the guaranteed level of average annual energy savings and the detailed factors taken into account in their assessment.<sup>43</sup> This regulation contains a catalogue of events that may affect the occurrence of the above risks.<sup>44</sup> In addition, this Regulation sets out the factors that will be taken into account in assessing the risks arising from the implementation of the obligations under the energy performance contracting scheme. These include, among others: the share of public funds in the investment costs incurred by the ESCO company for the creation of new fixed assets or the improvement of existing ones; the nature, timing and amount of payments made by the public entity to the ESCO company; the settlement rules in case the assumed level of energy savings is not achieved or is achieved at a higher level than agreed in the

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<sup>39</sup> M. Pawełczyk, *Prawo energetyczne. Efektywność energetyczna Tom I. Komentarz*, M. Czarnecka, T. Ogłódek (eds.), 2nd Edition, 2023, Article 7.

<sup>40</sup> Justification for the government draft of the Act amending the Act on energy efficiency and some other acts, parliamentary print number 957.

<sup>41</sup> P. Bertoldi, B. Boza-Kiss, A. Toleikyte, *Energy Service Market in the EU*, Publications Office of the EU, 2019, p. 117.

<sup>42</sup> The Act of 20 April 2021, amending the Act on energy efficiency and some other acts (Journal of Laws of 2021, item 868).

<sup>43</sup> Journal of Laws, item 2452.

<sup>44</sup> See: <https://wartowiedziec.pl/rozwoj-i-fundusze/60672-ryzyka-przy-umowie-o-poprawe-efektywnosci-energetycznej-jest-projekt-rozporzadzenia> (accessed 17 September 2023).

energy performance contract; changes in the legal provisions affecting the implementation of the energy performance contract; the rules for early termination of the energy performance contract, or the date of expiry of the energy performance contract.

The adoption of the amendment to the Energy Efficiency Act and the above-mentioned Regulation should be seen as an important positive step that may contribute to the development of the implementation of energy efficiency projects by public sector entities on the basis of energy performance contracting in Poland.<sup>45</sup>

#### **4.3. THE OBLIGATIONS OF THE PUBLIC SECTOR ENTITY UNDER THE ENERGY PERFORMANCE CONTRACT**

The main obligation of the public entity arising from the energy performance contract is to pay the ESCO company a remuneration for implementing the energy efficiency improvement project. However, as stated in Article 7(2)(2) of the Energy Efficiency Act, the amount of this remuneration depends on the energy savings achieved as a result of the implementation of the energy efficiency improvement project. Based on the energy performance contract, the financing model of such a contract looks, therefore, as follows: the ESCO company invests its own financial resources in the implementation of a specific project and recovers the costs incurred (together with the remuneration) through payments spread over time.<sup>46</sup>

It should be noted that the method of remuneration of the ESCO company under the energy performance contract is the main factor distinguishing this type of contracts from public-private partnership contracts. Public-private partnership contracts are regulated by the Act of 19 December 2008 on public-private partnership<sup>47</sup> (hereinafter: the Act on public-private partnership). It is noted that the energy performance contract is a specific type of public-private partnership contract.<sup>48</sup> This statement is somewhat confirmed by Article 7(6) of the Energy Efficiency Act, according to which the provisions of the Act on public-private partnership shall apply to energy performance contracts (with the exception of some provisions) in matters not regulated by this Act. However, there are many differences between energy performance contracts and public-private partnership

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<sup>45</sup> Examples of projects financed in the ESCO formula are available at this link: <https://www.gov.pl/web/klimat/przykladowe-projekty-finansowane-w-formule-esco> (accessed 17 September 2023).

<sup>46</sup> See: <https://www.umww.pl/artykuly/55681/pliki/formulaescofinal.pdf> (accessed 17 September 2023).

<sup>47</sup> Consolidated text: Journal of Laws of 2023, item 1637.

<sup>48</sup> Information on changes in the Act on energy efficiency and the Act on public-private partnership regarding Energy Performance Contracts (EPC), Ministry of Funds and Regional Policy, Public-Private Partnership Department, 2022.

contracts, and as mentioned above, the method of payment is one of the most important. The Guidelines have highlighted that the remuneration of the ESCO company is closely linked to the energy savings it achieves and always comes from the budget of a given public sector entity, while the remuneration of the private partner in the PPP contract is most often based on the availability fee or user fees and depends on the actual availability or actual use of the subject of the project.<sup>49</sup>

## 5. CONCLUSIONS

The analysis presented in this article shows that the potential for improving energy efficiency in the public sector, using a model based on the conclusion of energy performance contracts, is enormous. Undoubtedly, the legislative and programmatic actions taken by the European Union in this regard should be considered as necessary and crucial, not only in the fight against climate change but also in the shaping of a sustainable economy and a fair energy transition. The dynamics of these actions, and consequently of legislative changes, is very high. Therefore, Poland, as a member of the European Union, is facing an ambitious challenge to meet the requirements imposed by the EU institutions.

However, the legislative changes adopted by the Polish legislator in recent years indicate that it is making intensive and comprehensive efforts to meet these requirements. An example to support this thesis is the adoption of the new Energy Efficiency Act, as well as the adoption of its further amendments, and also (which is particularly important in the context of energy performance contracts concluded by public sector entities) the regulation in Polish law of issues related to the impact of obligations arising from energy performance contracts on public debt and the public finance sector deficit.

Equally important, the issue of improving energy efficiency is not only the subject of interest in legislation. It is also present in documents of a strategic nature, such as the PEP 2040, as well as in support materials prepared for public entities that explain the most complicated issues related to the conclusion of energy performance contracts, such as the Guidelines prepared this year by the Ministry of Climate and Environment.

The legislative and promotional measures described above have not yet eliminated all the barriers and problems in popularising the model of implementing energy efficiency projects based on energy performance contracts. It has been repeatedly pointed out in this article that the terminology used in the provisions of Directive 2012/27/EU and the Energy Efficiency Act is often imprecise, which

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<sup>49</sup> *Guidelines...* p. 25.

actually contributes to limiting the scope of concluding energy performance contracts by public entities. Undoubtedly, the Polish legislator should pay attention to this issue in the future, as the introduction of appropriate amendments to the legal provisions at low cost may contribute to a better understanding of the rules governing the conclusion of energy performance contracts and, consequently, to a more frequent use of this model by public sector entities.

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