Elżbieta Małecka

Administrative and Civil Law Aspects of the Approval of Energy Tariffs by the President of Energy Regulatory Office

The author presents the problems of approving energy tariffs in the legal-administrative and private law dimensions. The shaping of tariffs for gas fuels, electricity and heat is one of the legal-administrative antitrust instruments. The President of Energy Regulatory Office, as part of the competences granted by the legislator and related to approving tariffs, not only directly influences the competition in the energy market, but also the civil law nature of the relations between receivers and energy companies.

Elżbieta Małecka

Ph.D. of Juridical Science
University of Humanities and Economics in Lodz

ORCID – 0000-0002-1484-1383

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1. Introduction

The aim of the article is to present the problems of approving energy tariffs in the legal-administrative and private law dimensions. In the article, I shall prove the following thesis: approving energy tariffs is an effective means of realisation of the main task of the President of the Energy Regulatory Office – balancing economic interests of the participants of energy market.

The main plane for the deliberations will be legal provisions. The analysis will also include judicial decisions and scientific papers. The selection of the issues covered in the article taken into consideration from the perspective of the selected rulings of the Supreme Court has been mostly based on the information

provided on the website of the Energy Regulatory Office (www.ure.gov.pl). In the author's assessment, the list of the selected rulings of the Supreme Court related to the issues connected to approving tariffs made available on the quoted website is based on practical considerations and shows the most frequent problems related to this matter. The following methods were applied in the study: dogmatic-legal and analytic-synthetic.

2. Approving Tariffs by the President of the Energy Regulatory Office – Legal Considerations

One of the main tasks of the President of the Energy Regulatory Office is balancing economic interests of the participants of energy market. Approving tariffs and the related analysis and verification of costs considered justified by energy companies in calculating their tariffs are instruments of realizing this task. Due to the necessity of special protection of public interests, which cannot be subjected fully to market verification, the legislator saw the need to establish this specific form of regulation. The actions taken up by the President of the Energy Regulatory Office regarding tariffs of energy companies have the effect substituting market mechanism in competitive conditions[1].

The shaping of tariffs for gas fuels, electricity and heat was subjected by the legislator to detailed regulation in art. 44-49 of the Act of 10th April 1997 – Energy Law (consolidated text, Journal of Laws 2018, item 755, hereinafter referred to as EL) and in the Resolution of the Minister of Energy of 15th March 2018 on detailed rules of shaping and calculating tariffs and settlements in trading gas fuels (Journal of Laws 2018, item 640), the Resolution of the Minister of Energy of 29th December 2017 on detailed rules of shaping and calculating tariffs and settlements in trading electricity (Journal of Laws 2017, item 2500), and in the Resolution of the Minister of Energy of 22nd September 2017 on detailed rules of shaping and calculating tariffs and settlements in heat supply (Journal of Laws 2017, item 1988).

The aforementioned regulations significantly limit freedom of the parties to shape prices. The Constitutional Tribunal, in the ruling of 26/10/1999, case no. K 12/99[2], indicated that the EL regulations significantly cancelled

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1 Adam Dobrowolski, Renata Trypens, Donata Nowak, Marek Woszczyk, „Komentarz do art. 47", [in:] *Prawo energetyczne.* Komentarz, t. I, Komentarz *do art. 12-72,* ed. Zdzisław Muras, Mariusz Swora (Warszawa: Wolters Kluwer, 2016), 696 and the following pages; see Magdalena Jaś-Nowopolska, „Sądowa kontrola decyzji Prezesa Urzędu Regulacji Energetyki", [in:] *Sądowa kontrola administracji w sprawach gospodarczych*, ed. Andrzej Kisielewicz, Jan Paweł Tarno (Warszawa: Wolters Kluwer Polska, 2013), 171.

2 http://otkzu.trybunal.gov.pl/1999/6/120. [accessed: 28/07/2018].

the contract (civil law) nature of the relations between the recipients and energy companies, as the price constituting the essentialia negotii part of the contract is shaped without decision autonomy of the parties, based on the regulations of the generally applicable law.

The tariff is qualified in rulings uniformly as contract template as defined in art. 384 of the Civil Code, which is binding to the parties. It should be emphasised that the tariffs approved by the President of the Energy Regulatory Office constitute a special variation of the contract template[3]. It is assumed that if a new tariff is implemented during the term of a contract on supplying fuels or energy, the contract provisions mainly decide when it becomes binding to the parties[4].

3. Proceedings Concerning Approving Energy Tariffs

The problem common to the civil law and administration dimensions of approving energy tariffs is the issue of granting an energy recipient the quality of a party in proceedings based on the mode defined in art. 47 of EL. In the ruling of the Supreme Court of 22nd November 1999, case no. I CKN 897/99[5], the Court concluded that a party is only the entity the own legal interest or obligation of which is realised during administrative proceedings. Therefore, the issue of legal interests of the entity determining the fact of granting it the quality of a party in a case following the mode of art. 47 of EL, is defined by the regulations of this law. However, the legal interests of energy recipient are not based on the regulations of EL. In the Court's opinion, based on these regulations, it is not possible to point to the directness of the influence of a case proceeded according to art. 47 of EL on the legal sphere of an energy recipient. The Supreme Court maintained this position in the decision of 8th March 2000, case no. I CKN 1217/99 LEX no. 51654, in which it directly indicated that „in administrative proceedings held before the President of the Energy Regulatory Office concerning approving tariffs of gas fuels, electricity and heat […], the recipient of fuels or energy and heat is not eligible to be granted the quality of a party, as defined in art. 28 of the Administrative Procedure Code." Thus established line of judicial decision

3 Ruling of the Supreme Court of 10/11/2005, case no. III CK 173/05. http://www.sn.pl/sites/orzecznictwo/orzeczenia1/iii%20ck%20173-05-1.pdf. [accessed: 30.07.2018].

4 Adam Dobrowolski, Renata Trypens, Donata Nowak, Marek Woszczyk, „Komentarz do art. 47", 699.

5 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/i_ckn_879-99.pdf. [accessed: 28.07.2018].

was maintained in the ruling of the Supreme Court of 16th March 2004, case no. III SK 9/04[6].

The next issue related to the proceedings on approving energy tariff is the problem of competences of the President of the Energy Regulatory Office regarding the possibility of demanding from a company to modify the submitted tariff. The ruling of the Supreme Court of 8th January 2010, case no. III SK 31/09[7] concerned a situation, in which two members of a four-person management board submitted to the President of the Energy Regulatory Office a tariff prepared by the company for approval, and the other two members of the management board submitted, within the same proceedings, a different tariff for approval, also prepared by the company, which was significantly different from the first one. The Supreme Court saw the problem of the scope of competences of the President of the Energy Regulatory Office defined in art. 47, par. 2 of EL, and specifically it assessed the issue if this regulation limits the competences of the President of the Energy Regulatory Office only to approving a tariff or to deny its approval, and if prevents the President of the Energy Regulatory Office from analysing and verifying the costs adopted by a company for calculating a tariff (art. 23, par. 2, section 2 of EL). In the analysed ruling, the Supreme Court concluded that the indicated regulations unequivocally state that the President of the Energy Regulatory Office is competent for assessing if a tariff prepared by an energy company and submitted to the President of the Energy Regulatory Office for approval, pursuant to art. 47 of EL, is in accordance with the regulations of art. 44-46 of EL. Additionally, it noted that the regulation of art. 47, par. 2 of EL also states that the President of the Energy Regulatory Office is competent to verify the costs adopted by energy companies as justification for calculating prices and fee rates in tariffs, which, due to the construction of tariff, entitles the President of the Energy Regulatory Office to demand modification of a tariff submitted for approval by a company. The Supreme Court indicated that the regulation of art. 47, par. 2 of EL cannot be the basis of the rule of binding the President of the Energy Regulatory Office with the content of the demand to approve a tariff, and it noted that, pursuant to the established judicial decisions of the Supreme Court, the obligation of subjecting to the procedure of approving a tariff is a civil law obligation. Therefore, the President of the Energy Regulatory Office, if during the proceedings it is concluded that the tariff submitted for approval does not fully meat the requirements of art. 44-46, can, within the limits defined by the regulation of art. 23, par. 2, section 2 of EL, demand from an energy company to adjust the submitted

6 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/iii_sk_9-04.pdf. [accessed: 28.07.2018].

7 http://ure.gov.pl/pl/prawo/orzecznictwo-sadowe/orzeczenia-sadu-najwyz/5780,Orzeczenia-Sadu-Najwyzszego.html. [accessed: 28/07/2018].

tariff to such requirements. As indicated by the Supreme Court, if a company denies changing the submitted tariff, so that it would meet the requirements defined in art. 44-46 of EL, during the proceedings, the President of the Energy Regulatory Office, pursuant to instruction in art. 47, par. 2, shall deny approving the tariff[8].

4. Admissibility of Changing an Approved Tariff

The issue generating numerous doubts, which are significant both to an energy company and, in the long run, to energy recipients, is the problem of admissibility of changing an approved tariff.

The ruling of the Supreme court of 26th February 2004, case no. III SK 5/04[9] was related to the following facts. An energy company with a licence for transferring and distributing electricity and a licence for trading electricity obtained, based on the decision of the President of the Energy Regulatory Office of 5th July 2001, an approval of the tariff for electricity it prepared. Afterwards, in a letter dated 17th August 2001, the energy company applied, pursuant to art. 155 of the Administrative Procedure Code, for approving changing the previously approved tariff for electricity, justifying the application with the increase of costs of purchasing electricity and transfer services from a distribution company, which, in comparison to the assumptions in the previously submitted application, were estimated at a lower amount than the actual price.

Taking this case under consideration, the Supreme Court indicated that one of the Act's objectives is to counteract negative monopoly effects and to protect the interests of recipients as well as minimising the costs. For this reason, the President of the Energy Regulatory Office was granted the competence regarding regulating the activities of an energy company also by issuing decisions concerning approving electricity tariff for it, which sets prices or energy fees for specific recipients and establishes the conditions of applying them. Whereas, tariffs for electricity should be set in a way ensuring at the same time, on one hand – covering justified costs of an energy company conducting activity, and on the other – also the protection of recipients' interests against unjustified price levels.

The Supreme Court also considered the rule of durability of the decision of the President of the Energy Regulatory Office on approving tariffs. This rule is based on assuming one-year durability of the President of the Energy Regulatory Office' decision on approving a tariff. The goal of

8 See: Marta Boroń, „Rola Prezesa Urzędu Regulacji Energetyki w postępowaniu o zatwierdzanie taryf" *Roczniki Administracji i Prawa*, vol. X (2010): 99 and the following pages.

9 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/iii_sk_5-04.pdf. [accessed: 28.07.2018].

implementing and applying this rule in energy market is to support stabilisation of this market and reliability of the legal situation of all of its participants, also including electricity recipients. Specifically, this rule guarantees the reliability of conditions of purchasing electricity for the so-called end user. As stipulated by the Supreme Court, also the legal obligation of shaping a tariff in such a way that on its basis recipients could calculate the due amount corresponding to the scope of services related to supplying electricity, as determined in the electricity sales contract or transfer service contract, was implemented for the same purpose. The Supreme Court concluded that the intended consequence of these legal solutions is the fact that every recipient of electricity, specifically also the end user, thanks to the durability of the decision of the President of the Energy Regulatory Office on approving a tariff, can rationally and reliably plan in their budget the funds required to spend for the costs of electricity consumption. The Supreme Court stipulated that departure from the legal rule of the tariff being binding for 12 months from 1st July of every year is possible only in the case of unforeseen, significant change of conditions of conducting business activity by an energy company, whereas this regulation, as an admissible exception, should follow strict interpretation. Therefore, the Supreme Court adopted a position that in the described case the difference between the rates and fees defined in the tariff binding in a given year and the actual rates and fees paid by the company cannot be treated as a case of an unforeseen, significant change of conditions of conducting business activity by an energy company.

It should be emphasised that, under the legal conditions binding at the time, there was no legal regulation that could be a legal basis for the effectiveness of the tariff until the moment the proceedings related to appealing from the decision of the President of the Energy Regulatory Office ended. The interpretation based on the „periodic" rule, which was applied in the discussed ruling, indicated a one-year duration of the approved tariff and the fact that in its essence and function, the decision on approving a tariff can be effectively changes only in its duration, as after this period the decision expires. Departure from this rule is provided for in the regulation of art. 47, par. 2c, section 2 of EL, which has been effective since 3rd May 2005, pursuant to which the old tariff – and, at the same time, the decision approving it – is effective from the moment the new tariff is approved or from the moment the court proceedings related to appealing from the decision of the Energy Regulatory Office on approving the new tariff are finalised. Therefore, it is admissible for common courts to change the content of decisions on approving new tariffs, because such a tariff is effective from the moment the court proceedings are finalised and the results are binding. The Supreme Court

pointed to this issue in reasons for ruling of 5th June 2007, case no. III SK 7/07[10]. A similar interpretation of art. 47, par. 2c of EL was presented by the Supreme Court in ruling of 14th January 2009, case no. III SK 23/08[11]. The decision on approving a tariff can be changed or annulled, pursuant to art. 155 of the Administrative Procedure Code before the end of the period for which the tariff has been determined. After this period, art. 155 of the Administrative Procedure Code cannot be applied for this decision, because of art. 47, par. 2 of EL. Changing such a decision pursuant to art. 155 of the Administrative Procedure Code after the period, for which the tariff was set, and before a new tariff comes into effect, would mean bypassing a clear legislative warrant to apply the old tariff until a new tariff comes into effect.

The Supreme Court noted the exceptional nature of art. 155 of the Administrative Procedure Code in the ruling of 19th January 2005, case no. III SK 36/04[12], at the same time confirming the arguments used by the District Court – Court of Competition and Consumer Protection that extending the effective period of an old tariff is subject to the restrictions defined in art. 47 of EL, as it constitutes approval of the old tariff for a further period. As indicated by the Supreme Court, EL does not stipulate entitling the President of the Energy Regulatory Office to issue temporary resolutions in this scope, which would be analogous to the ones granted by art. 8, par. 2. This means that the body can only approve the old tariff to be applied for a further period as part of the competences, mode and premises resulting from art. 47 of EL.

The problem of admissibility of changing an approved tariff was covered in the Resolution of seven judges of the Supreme Court of 15th June 2004, case no. III SZP 2/04[13]. The legal issue raising doubts was worded as follows: "if the costs of purchasing electricity and transfer services from the company Polskie Sieci Elektroenergetyczne S.A., which result from the decision issued by the President of the Energy Regulatory Office on approving for this company a new tariff of higher fee rates for a given year, is it justified to change the decision of the President of the Energy Regulatory Office issued earlier and approving for the same year a tariff with fee rates charged by the energy company with a licence for transferring, distributing and trading electricity, which buys energy and transfer services from PSE S.A., due to the fact that, when calculating the fee rate tariff for this energy company already

10 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/akt_iii_sk_7-07_05-06-2007.pdf. [accessed: 29.07.2018].

11 http://ure.gov.pl/pl/prawo/orzecznictwo-sadowe/orzeczenia-sadu-najwyz/5780,Orzeczenia-Sadu-Najwyzszego.html. [accessed: 29.07.2018].

12 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/iii_sk_36-04.pdf. [accessed: 29.07.2018].

13 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/iii_szp_2-04.pdf [accessed: 29.07.2018].

approved for the given year, lower than planned (foreseen) PSE S.A.'s fee rates were assumed for the same period than the fee rates determined for the given year in the tariff later approved by the decision of the President of the Energy Regulatory Office for PSE S.A."

The Supreme Court adopted a resolution that „the increase in the costs of purchasing electricity and transfer services from PSE S.A. resulting from the decision on approving for this company a new tariff with higher fee rates for a given year issued by the President of the Energy Regulatory Office, can – pursuant to art. 155 of the Administrative Procedure Code – constitute a circumstance justifying changing or cancelling the decision of the President of the Energy Regulatory Office issued earlier and approving a fee tariff charged by the energy company, which buys electricity and transfer services from PSE S.A.". The Supreme Court adopted a similar position in ruling of 17th March 2005, case no. III SK 14/04[14] .

The issue of the influence of changing prices and rates was also brought up by the Supreme Court in ruling of 20th April 2017, case no. III SK 13/16[15]. In this ruling, the Supreme Court presented a view that market changes in energy prices can lead to lower profitability of a company's activity in the market of the tariff in a period following the decision of the President of the Energy Regulatory Office. In this situation, changing the previously approved tariff, pursuant to art. 155 of the Administrative Procedure Code, is at the discretion of the President of the Energy Regulatory Office, whereas it is acceptable to change the tariff if it is supported by a valid interest of the party, related to the necessity of adjusting tariffs to the justified costs. The Court indicated, however, that due to the arbitrary nature of the decision issued pursuant to art. 155 of the Administrative Procedure Code, also a denial to change a tariff can be acceptable, based on the argument that the level of prices and rates included in the original tariff decision assumed covering the costs and profits of an energy company, and the potential later decrease in profitability of the activity of energy company can be compensated by the revenues generated in other markets. Whereas, changing tariff decisions, pursuant to art. 155 of the Administrative Procedure Code, in relation to a new market situation, should not become a rule, as it would go against the final nature of administrative decisions.

5. Financial Penalty for Applying Unapproved Energy Tariff

The issue closely related to the situation of end users and having influence on the contents of contracts is the application of unapproved energy

14 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/iii_sk_14-04.pdf. [accessed: 29.07.2018].

15 http://ure.gov.pl/pl/prawo/orzecznictwo-sadowe/orzeczenia-sadu-najwyz/5780,Orzeczenia-Sadu-Najwyzszego.html. [accessed: 29.07.2018].

tariffs by energy companies. The legislator, in art. 56, par. 1 of EL, defined repressions for such actions for the company in the form of a financial penalty.

The problem of the possibility of charging a financial penalty to an energy company, which for some time had been applying unapproved energy tariffs, and then adjusted to the legislative obligation of using tariffs approved by the President of the Energy Regulatory Office, pursuant to art. 47 of this Act, was covered by the Supreme Court in ruling of 9th March 2004, case no. III SK 17/04[16]. The Supreme Court indicated that, firstly, the legality of charging a financial penalty pursuant to art. 56, par. 1 of EL, to an energy company applying unapproved energy tariffs is not invalidated by the penalised company adjusting in the following periods not covered by the charged penalty to the legislative obligation of using tariffs approved by the President of the Energy Regulatory Office, pursuant to art. 47 of this Act. Secondly, as argued by the Court, the financial penalty charged by the President of the Energy Regulatory Office, pursuant to art. 56 of EL, accomplishes repression goals for not following the unconditionally binding requirements of this Law, and, additionally, it preventively strives at forcing the penalised energy companies to follow these imperative rules in the future.

The Supreme Court referred to the issue of penalised non-observance of the obligation of submitting a tariff for approval and the date of performing the obligation of submitting an energy tariff for approval in its ruling of 7 April 2004, case no. III SK 30/04[17]. It should be emphasised that this ruling was made before art. 47, par. 2c of EL came into force, in which the legislator solved the problem: which energy tariff should be applied if the period for which a tariff was determined expired, until a new tariff comes into force, and also in relation to the factual state, in which the energy company was using the tariff submitted for approval. However, the arguments of the Court regarding the date of submitting a tariff for approval are worth noting.

In this case, the legal issue was based on a question if the financial penalty defined in art. 56, par. 1, section 5 of EL is also charged to an entity applying prices and tariffs unapproved by the President of the Energy Regulatory Office, but already set by the proper entity and submitted to the President of the Energy Regulatory Office for approval. The Supreme Court indicated that, accordingly to the indicated regulation, „financial penalty is charged to the entity applying prices and tariffs while not observing the obligation of submitting them to the President of the Energy Regulatory Office, described in art. 47". Due to the fact that the penalised non-observance of the obligation of submitting a tariff for approval should not be determined separately

16 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/iii_sk_17-04.pdf. [accessed: 30.07.2018].

17 https://www.ure.gov.pl//ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/iii_sk_30-04.pdf. [accessed: 30.07.2018].

from art. 47, which is referred to, as the determining element, directly by art. 56, par. 1, section 5., the Supreme Court concluded that, in light of the quoted article, defining what should be understood as observing the obligation of submitting a tariff for approval to the President of the Energy Regulatory Office cannot be limited only to submission out of own initiative or on demand by the President of the Energy Regulatory Office (art. 47, par. 1). It should be taken into account that the submitted tariff is considered by the President of the Energy Regulatory Office within a specific period (art. 47, par. 2), and that the approved tariff is subject to appropriate publication (art. 47, par. 3), and only after following this procedure a tariff is created, which the energy company can – at a specific date – apply. As the condition for applying a tariff is not only its submission, but also obtaining approval by the President of the Energy Regulatory Office, publication and waiting a certain period from publication, non-compliance with these requirements equals non-observance of the obligation described in art. 56, par. 1, section 5 of EL.

The ruling of the Supreme court of 13th January 2016, case no. III SK 6/15[18] was related to a similar situation. An energy company submitted a tariff for approval three days before the expiry of the previous tariff. Based on art. 47, par. 2c of EL, the energy company applied the old tariff, which determined higher fee rates and prices, which enabled them to gain additional revenues. The President of the Energy Regulatory Office charged the energy company with a penalty, pursuant to art. 56, par. 1, section 5 of EL.

Considering this case, the Supreme Court favoured the arguments of the Court of Appeal in Warszawa of 25th November 2014, case no. VI ACa 152/14, referring to the following legal issues:

- the possibility of applying the old tariff was not dependent on the premise of earlier submission of an application for approving a new tariff at a date enabling the President of the Energy Regulatory Office approving it before the expiry of the old tariff;
- art. 47 of EL does not determine the date of submitting an application for approving a new tariff;
- having negative effects for recipients does not meet the definition of the act described in art. 56, par. 1, section 5 of EL;
- regulations of financial penalties must completely, precisely and unequivocally define all the features of the acts threatened with penalties, and the application of an extensive interpretation, analogies or implications is unacceptable. The contents of art. 56, par. 1 of EL results in the fact that only behaviours indicated in individual sections of this regulations are penalised.

18 http://ure.gov.pl/pl/prawo/orzecznictwo-sadowe/orzeczenia-sadu-najwyz/5780,Orzeczenia-Sadu-Najwyzszego.html. [accessed: 30.07.2018].

The Supreme Court also noted the problem of the regulations lacking the date of submitting the application for approval of a new tariff. The solution anticipated in art. 47, par. 2c of EL is for protecting the recipients' interests, but it can, however, be an incentive to energy companies to submit tariffs at the latest possible date, to extend the period of applying the old, higher tariff. As indicated by the Supreme Court, such behaviour to an extent goes against the goal of the EL Act, which is the protection of recipients' interests. These interests are violated if a new tariff includes lower rates, but for some period of time, as a result of tardiness of an energy company, the old (higher) tariff is still used (pursuant to art. 47, par. 2c of EL).

The view presented in the quoted ruling generated controversy within the doctrine. In a positive gloss, Anis Ben Amer and Tomasz Feliszewski[19] considered it accurate, whereas Michał Kruszewski, in his gloss, was critical about the ruling adopted by the Supreme Court[20].

6. Prices and Fee Rates Included in an Approved Tariff – Legal Nature

The problem of legal nature of prices and fee rates in an approved tariff is of enormous significance for the civil law dimension of energy tariffs. As indicated above, tariff is a specific type of contract template, therefore, the price, which an *essentialia negotii* element of contract, is shaped on the basis of regulations of generally effective law. The source of doubts is the question if the prices and fee rates determined in tariffs are maximum prices, as defined in art. 538 of the Civil Code, or rigid prices, as defined in art. 537 of the Civil Code. The solution of this problem influences the possibility of recipients negotiating prices for the supplied fuel gas or energy or fee rate for transfer service or distribution of fuel gases or energy with energy companies, and the fact if a contract party is automatically bound by a new tariff. If we assume that prices and rates resulting from an approved tariff are maximum in nature, the recipient has the possibility of negotiating their amounts, and the changed tariff will be binding to them only after the expiry of the term of notice. If we assume that tariff prices and rates are rigid in nature – the recipient

19 Anis Ben Amer, Tomasz Feliszewski, „Stosowanie taryf w okresie przejściowym a dopuszczalność nakładania kary pieniężnej za stosowanie taryf wbrew obowiązkowi ich przedstawienia Prezesowi URE do zatwierdzenia. Glosa do wyroku Sądu Najwyższego z dnia 13 stycznia 2016 r., sygn. III SK 6/15" *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, No. 4 (2016): 89 and the following pages.

20 Michał Kruszewski, „Dopuszczalność wymierzenia kary pieniężnej za zbyt późne złożenie przez przedsiębiorstwo energetyczne wniosku o zatwierdzenie taryfy. Glosa do wyroku Sądu Najwyższego z dnia 13 stycznia 2016 r. III SK 6/15" *Krytyka Prawa*, No. 4 (2016): 68 and the following pages.

will have to pay a fee determined on the basis of the amounts of prices and rates defined in the tariff[21].

The Supreme Court, in ruling of 18/12/2002, case no. IV CKN 1616/00[22], shared the view that negotiating prices with the tariff described in art. 3, section 17 of EL is possible, expressed in the resolution of the Supreme Court of 8th March 2000, case no. I CKN 1217/99. The Court indicated that the parties can agree on fee rates in amounts lower than determined in the tariff. The legislative wording, according to which a tariff is binding for energy recipient, means only that the prices set in it are within the notion of adjustable prices, whereas they are maximum prices, as defined in art. 538 of the Civil Code, and not rigid, which are described in art. 537 of the Civil Code. This view is justified by art. 56, par. 1, section 6 of EL, which charges financial penalties to an energy company using prices and tariffs higher than the approved ones.

It should be noted that in the quoted resolution of the Supreme Court of 8th March 2000, the Supreme Court stated that the prices of fuels and energy set in a tariff should be classified as adjustable prices, defined in the way that their amounts are set by sellers (suppliers) on the basis of the rules determined by the proper public administration bodies. If so, they are maximum prices, and not rigid ones. Whereas, it indicated that, when setting and approving them, there is a legislative warrant (directed at energy companies and the President of the Energy Regulatory Office) to ensure protection of recipients' interests from unjustified price levels. The price remains adjustable, not rigid, however.

The Supreme Court adopted a similar position in ruling of 10/11/2005, case no. III CK 173/05[23]. The Court indicated that the effect of art. 3, section

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21 Adam Dobrowolski, Renata Trypens, Donata Nowak, Marek Woszczyk, „Komentarz do art. 47", 700; see: Marzena Czarnecka, Tomasz Ogłódek, „The Energy Tariff System and Development of Competition in the Scope of Polish Energy Law" *Yearbook of Antitrust and Regulatory Studies*, No. 4 (2011): 151 and the following pages; Donata Nowak, „Ceny sztywne czy maksymalne" *Biuletyn URE*, No. 5 (1999): 12 and the following pages; Ryszard Taradejna, „Charakter prawny cen i stawek opłat zawartych w taryfie przedsiębiorstw energetycznych" *Biuletyn URE*, No. 1 (2003): 2 and the following pages; Ryszard Taradejna, Alicja Tutak, „Problemy i pułapki administracyjno-prawnego zatwierdzania taryf przedsiębiorstw energetycznych" *Biuletyn URE,* No. 6 (2005): 77 and the following pages.

22 http://www.sn.pl/sites/orzecznictwo/orzeczenia1/iv%20ckn%201616-00.pdf. [accessed: 30.07.2018].

23 http://www.sn.pl/sites/orzecznictwo/orzeczenia1/iii%20ck%20173-05-1.pdf. [accessed: 30.07.2018].

17 and of art. 47 of EL is that a tariff is binding for recipients. This means, however, that the nature of energy prices set on the bases of tariffs is one of adjustable maximum prices, as defined in art. 538 of the Civil Code. Therefore, the price set by means of a tariff is not a rigid price in nature, as defined in art. 537 of the Civil Code. For this reason, if preparing a tariff enables a company supplying energy with the possibility of setting a price not higher than the one defined in the tariff, there are no obstacles for it to make an agreement with recipients to supply them with energy for a price lower than resulting from the approved tariff.

The Supreme Court also noted that this nature of tariff influences its interpretation as a contract template issued during the term of the contract, as the appearance of a new tariff during a relationship between energy supplier and recipient has no direct influence on changing the energy price defined in the contract, if such a price is not higher than the one stipulated in the tariff. In this case, which is the result of a tariff being adjustable maximum price, energy supplier can change the contract and raise the price to the price level set in the tariff. A contract can be changed in accordance with the rules defined in it or determined by the regulations in the Civil Code. As indicated by the Supreme Court, differently than in the case of contract templates, the rules resulting from art. 384^1 of the Civil Code cannot be directly applied to the tariffs approved by the President of the Energy Regulatory Office. Therefore, energy suppliers, when concluding contracts with recipients, before approving a tariff for them by the President of the Energy Regulatory Office, should anticipate in it the possibility of changing it after approving the tariff. Otherwise, if the price set in the contract is lower than the one resulting from the tariff, it may be impossible to increase it without the consent of a recipient.

The Supreme Court in a resolution of 7 judges of 15/02/2007, case no. III CZP 111/06[24], critically referred to the position of the Supreme Court expressed in the earlier rulings. The Court provided the following arguments. Firstly, setting prices of energy supplied to recipients is not left – as in the case of maximum prices – to free negotiations between the parties. Based on art. 45, par. 4 of EL, energy companies differentiate prices and fee rates defined in tariffs for different groups of recipients only due to the justified costs of performing the service, unless regulations state otherwise. Similarly, discounts are granted not at the free discretion of an energy company, but on the basis of not maintaining the quality standards of servicing recipients at the level defined in tariff or contract (art. 45a, par. 3 of EL). Secondly, "the exclusion of the possibility of free negotiation of prices is indicated also by strictly regulated rules of classifying individual energy recipients into tariff groups, for

24 http://www.sn.pl/sites/orzecznictwo/orzeczenia1/iii%20czp%20111-06.pdf. [accessed: 30/07/2018].

which one set of prices or fee rates and conditions of applying them are used (§ 2, section 12 of the resolution of 23rd April 2004 and § 2, section 15 of the resolution of 30th July 2004)".

In the opinion of EL commentators, the quoted position of the Supreme Court should be fully shared. Granting an energy company the right to freely decide about the application of a price or a fee rate lower than stated in a tariff call into question the sense of submitting the tariff to the procedure of approving by the body of the President of the Energy Regulatory Office. Additionally, in relation to the conducted fuel transfer or distribution activity, it would be connected to the risk of discrimination of individual network users. Another argument for confirming this view are the regulations of resolutions on detailed rules of shaping and calculating tariffs and settlements. According to § 29, par. 4 of the resolution of the Minister of Energy of 15th March 2018 on the detailed rules of shaping and calculating tariffs and settlements in trading gas fuels, the prices of gas fuels and subscription fee rates set in a tariff are maximum prices and rates in nature. Whereas, the application of prices and rates lower than the approved ones is possible under the condition of equal treatment of recipients in tariff groups, which involves ensuring every recipient from a given tariff group the possibility of using lower prices and fee rates following the same rules. The resolutions on electricity and heat do not include a similar provision. This wording of regulations indicates the generally rigid nature of tariff prices and the fact that the maximum nature of tariff prices refers only to the prices of gas fuels, while the prices of electricity and heat are subject to the regime of rigid prices[25].

7. Conclusion

These deliberations confirm the thesis put forward in introduction: approving energy tariffs is an effective means of realisation of the main task of the President of the Energy Regulatory Office – balancing economic interests of the participants of energy market. The regulations for approving tariffs and the practical problems related i.a. to the admissibility of changing an approved tariff, the date of submitting a tariff for approval, and the nature of prices show the extent of indirect and direct influence on civil law relationships between energy market participants of administrative issues related to approving tariffs by the President of the Energy Regulatory Office. It should be emphasised that every action taken by an energy company translates into the contents of contracts, e.g. in the form of set prices or in the case of submitting for approval a new tariff with lower prices close to the expiry of the old tariff including higher prices.

25 Adam Dobrowolski, Renata Trypens, Donata Nowak, Marek Woszczyk, „Komentarz do art. 47", 701.

At the same time, it should be stipulated that, in the author's view, a good solution would be to define a legislative date for companies to perform the obligation of submitting tariffs for approval by the President of the Energy Regulatory Office, pursuant to art. 47 of EL. It is worth emphasising that as part of the competences of the President of the Energy Regulatory Office, they can summon a company to perform this obligation, however, the aforementioned solutions seems simpler than monitoring the effective tariffs and issuing summons to companies.

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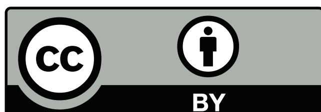

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