# Can Coordination Between the Producer and the Distributor in the Process of Calculating Prices and Their Structure in the Tariff Process Be Regarded as Legally Prohibited, Having Regard to the Provisions of Sectorial Regulation and the Regulatory Practice? Case Comment to Decision of the President of UOKiK of 3 December 2020, DOK-5/2020

by

Filip Elżanowski*

**CONTENTS**



* Filip Elżanowski, PhD, Associate Professor, Department of Administrative Law and Administrative Procedure, Faculty of Law and Administration, University of Warsaw, e-mail: filip.elżanowski@uw.edu.pl; ORCID: 0000-0003-3912-1857.

Article received: 8 April 2021, accepted: 27 June 2021.

## *Abstract*

This is a case study analysis based on the decision No. DOK-5/2020 issued by the President of the Office of Competition and Consumer Protection (hereinafter: UOKiK) of 3 December 2020.
The main part of the text will be devoted to the analysis of the scope of competences of the President of Energy Regulatory Office (hereinafter: URE) (the NRA) and the President of UOKiK (the NCA) regarding the regulation of heat prices (taking into account Polish and EU doctrine and jurisprudence). In contrast to other publications on the relationship between the competences of the President of URE and the President of UOKiK in supervising the heat market, the paper will focus on the following issues: the process of exchanging information between generators and distributors, the practice of tariff proceedings before the President of URE and the role of the President of UOKiK in the process of tariffing heat prices.
The conclusion of the text will be that due to the provisions of Polish energy law, the role of the President of URE in the tariff process, the public nature of tariff applications and approved tariffs, no unauthorised coordination of information exchange between heating companies is possible. The thesis will be supported by *de lege ferenda* arguments.



## *Résumé*

Ce commentaire est basé sur la décision n° DOK-5/2020 émise par le président de l'Office polonais de la concurrence et de la protection des consommateurs (ci-après: UOKiK) du 3 décembre 2020.
La partie principale du texte est dédiée à l'analyse de la portée des compétences du président de l'Office de régulation de l'énergie (ci-après : URE) et du président de l'UOKiK en ce qui concerne la régulation des prix de la chaleur (en tenant compte de la doctrine et de la jurisprudence polonaises et européennes). Contrairement à d'autres publications sur la relation entre les compétences du président de l'URE et du président de l'UOKiK dans la supervision du marché de la chaleur, le commentarie se focalise sur les questions suivantes: le processus d'échange d'informations entre les producteurs et les distributeurs, la pratique des procédures tarifaires devant le président de l'URE et le rôle du président de l'UOKiK dans le processus de tarification des prix de la chaleur.
La conclusion du commentaire est qu'en raison des dispositions de la loi polonaise sur l'énergie, du rôle du président de l'URE dans le processus de tarification, du caractère public des demandes de tarifs et des tarifs approuvés, aucune coordination non autorisée de l'échange d'informations entre les sociétés de chauffage n'est possible. La thèse sera soutenue par des arguments de lege ferenda.


**Key words:** tariff; monopoly; competition; restrictive agreement; competition authority; regulatory body.

**JEL:** K21

## I. The facts

The President of the Polish National Competition Authority (NCA) – the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów*; hereinafter: UOKiK), pursuant to Article 10(1) of the Act of 16 February 2007 on competition and consumer protection (hereafter: Polish Competition Act, PCA)[1] and Article 3(1) and Article 5 of EU Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,[2] by decision of 3 December 2020 DOK-5/2020 (hereinafter: Decision of the President of UOKiK)[3] deemed a practice to restrict competition on the market for generation of heat in a district heating system, comprising the territory of the city of Warsaw and the market for retail sales of heat in a district heating system covering the area of the City of Warsaw, by way of the conclusion by:

(i) Veolia Energia Warszawa S.A. based in Warsaw;
(ii) Veolia Energia Polska S.A. with its registered office in Warsaw;
(iii) PGNiG Termika S.A. with its registered office in Warsaw;
(iv) Polskie Górnictwo Naftowe i Gazownictwo S.A. with its seat in Warsaw;

of an agreement within the meaning of Article 4(5) of the PCA and, at the same time, an agreement or concerted practice within the meaning of Article 101 of the Treaty on the Functioning of the European Union (hereinafter: TFEU)[4] consisting of:

1. reconciling prices of heat – that is, an infringement of Article 6(1)(1) of the PCA and Article 101(1)(a) TFEU;
2. division of the heat market – that is, an infringement of Article 6(1)(3) of the PCA and of Article 101(1)(c) TFEU;
3. reconciling the terms and conditions of bids submitted in tenders for the sale and supply of heat – that is, an infringement of Article 6(1)(3) and (7) of the PCA and of Article 101(1)(c) TFEU.

The President of UOKiK found that the parties to the agreement participated in these infringements from no later than 18 September 2014 until June 2017.

---

[1] Consolidated text Journal of Laws of 2021, item 275.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1/1).

[3] https://decyzje.uokik.gov.pl/bp/dec_prez.nsf.

[4] Consolidated version of the Treaty on the Functioning of the European Union of 13 December 2007 (OJ 2008/C 115/01).

For these violations, the President of UOKiK imposed fines on Veolia Energia Warszawa S.A. and Veolia Energia Polska S.A. Moreover, it was also found that the managers intentionally, through their actions and omissions, committed a breach of the prohibitions referred to in points 1 and 2 above by Veolia Warszawa S.A. and for this it imposed a fine on them.[5] At the same time, pursuant to Article 113b of the PCA, the President of UOKiK refrained from imposing a fine on PGNiG Termika S.A. with its registered office in Warsaw and Polskie Górnictwo Naftowe i Gazownictwo S.A. with its registered office in Warsaw. Similarly, recognising that the manager of PGNiG Termika S.A. intentionally, through its actions and omissions, committed a breach of the prohibitions referred to in points 1 and 2 above, pursuant to Article 113b in conjunction with Article 113j (1) of the PCA, the President of UOKiK refrained from imposing a fine on the manager of the company.

This article focuses on the issue of the correctness of the decision of the President of UOKiK with respect to the reconciliation of heating energy prices.

## II. Natural monopoly in the district heating sector. Characteristics of the Warsaw district heating market

The analysis of the case should begin with a brief characterisation of the market affected by the decision of the President of UOKiK.

District heating is the most monopolised element of all segments of the energy sector, as will be shown below. The heat sector, including district heating, comprises the economic activities of: generation of heat energy, supply of heat energy (transmission and distribution) and sale (trade) of heat energy.

The President of UOKiK, in his decisions in antitrust cases, has repeatedly referred to the district heat sector as a natural monopoly market. The antitrust authority defined and still defines the markets of district heating as local markets, limited by the range of the heat network, indicating that producers and distributors act as entrepreneurs operating under the conditions of a natural monopoly, indicating at the same time that due to the existence of natural monopolies and the resulting role of, among others, the President

[5] Veolia Energia Warszawa S.A. was fined 92,208,077.56 PLN (approximately 20 mil EURO), Veolia Energia Polska S.A. was fined PLN 27,546,221.35 (approximately 6 mil EURO), the person managing Veolia Energia Warszawa S.A. was fined PLN 200,000 (approximately 44000 EURO).

of the Energy Regulatory Office – the Polish National Regulatory Authority (NRA) for the energy sector – there is no risk of restriction of competition.[6]

As rightly noted by Z. Muras and M. Swora (2016): 'The diversity of activities undertaken by heating companies (trading, transmission, distribution) due to the mentioned features does not allow, in principle, to qualify any of the segments of this market as competitive under the provisions of the Energy Law, therefore heating companies are referred to as a natural monopoly and are subject to strict tariffs'.

It should be noted that the Warsaw market for district heat has similar characteristics to other heat markets, and so the Warsaw market for district heat also has a natural monopoly, which means that there is no competition in each heat market segment.

Thus, due to lack of competition in this market, there were no grounds for the President of UOKiK to issue a decision finding that a practice restricting competition occurred on the market for the generation of heat energy in the network system in the City of Warsaw and the market for retail sales of thermal energy in the network system in the City of Warsaw.

## III. Heat pricing. Approval of heat tariffs by the President of URE – regulations, regulatory practice of the sectorial regulator

Heat prices, in the form of tariffs, are approved by the Polish energy regulator, the President of URE. Pursuant to Article 23(2)(2) of the Energy Law Act of 10 April 1997 (hereinafter: ELA),[7] the scope of the President of URE's activity includes approval and control of the application of tariffs for gaseous fuels, electricity and heat in terms of compliance with the principles set out in Articles 44, 45 and 46. This includes the analysis and verification of costs accepted by energy enterprises as justified for the calculation of tariff prices and charge rates, and determining the return on capital pursuant to Article 23(2)(3c) of the ELA.

The tariff regulation, like other provisions of the ELA, is designed to implement the objectives of the ELA set forth in its Article 1(2), which are the creation of conditions for sustainable development of the country, ensuring energy security, economical and rational use of fuels and energy, development of competition, counteracting the negative effects of natural monopolies, taking into account environmental protection requirements,

[6] See i.a.: UOKiK decision of 06.03.2000 no. 3/2000, UOKiK decision of 10.06.2002 no. DL WR 9/2002, UOKiK decision of 07.06.2016 no. DKK-82/2016.

[7] Consolidated text Journal of Laws of 2021, item 716.

obligations arising from international agreements, and balancing the interests of energy enterprises and consumers of fuels and energy. In the market for district heat, it is necessary to pursue these objectives in such a way as to take into account their effects arising from the specificity and role of the product, which is district heat as a public utility good that should be available to all its consumers, which in particular means the need to ensure security of supply, that is, maintaining the infrastructure in a ready to use condition, market development and price optimization (which does not mean its minimization at the expense of the interests of district heat suppliers).

It is important to point out that the prices and charge rates approved by the President of URE in the tariff are of a rigid and not maximum character, which means that the energy (heating) company cannot negotiate them with the consumer and consequently apply – obviously – higher prices and charge rates, but it also cannot apply lower prices and charge rates under the sanction of an administrative fine[8] due to the unacceptability of subsidizing some customers at the expense of others, resulting from the nature of district heat as a public utility good.

Thus, the provisions of the ELA introduced an institution allowing the President of URE to establish the existence of competition on the market, and thus to establish a condition necessary for the performance of tasks by the President of UOKiK. The power of the President of URE, contained in Article 49(1) of the ELA, to exempt an energy company from the obligation to submit tariffs for approval, if the authority finds that the energy company operates under competitive conditions, is an important part of the system of fuel and energy pricing. Therefore, if free market mechanisms are found and established in the energy sector, the President of URE excludes his jurisdiction to regulate the market in question. At the same time, the obligation to approve tariffs will be cancelled and there is space for the President of UOKiK to act. The current regulatory practice of the President of URE shows that in the Polish district heat sector no heat enterprise has been exempt from the obligation to submit tariffs to the President of URE for approval, which clearly indicates that there are no competitive markets in the district heat field.

Both the tariffs of PGNIG Termika and of Veolia Warszawa applied in the years covered by the decision of the President of UOKiK which stated that an agreement restricting competition had been concluded were, in fact, approved by the President of URE and after their publication, they entered legal circulation and were, thus, binding on heat consumers.

[8] Resolution of Supreme Court (7 judges) of 15.02.2007, III CZP.

## IV. The relationship of sectorial regulation and competition law. The relationship between the powers of the sector regulator and the antitrust authority

Literature and jurisprudence point to the separateness of sector regulation from antitrust regulation reflected in the separateness of authorities and different methods of market regulation. (Hoff, 2008, p. 80). Key among many other differences is the *ex ante* nature of actions taken by the sectorial regulator and the *ex post* nature of action taken by the competition authority. In the case of *ex ante* actions, characteristic of the body responsible for sectorial regulation, these are, as a rule, actions whose content prescribes the future behaviour of the addressees. This distinguishes them from supervisory and antitrust actions, which relate to correcting actions already taken by entrepreneurs (Skoczny, 2003, p. 117). There are studies in European literature on the impact of competition law on regulated infrastructure sectors, where CJEU case law is usually extensively discussed (e.g. Colomo, 2016), therefore it is reasonable to proceed directly to the analysis of the judgments relevant to the analysed decision of the President of UOKiK.

At EU level, relevant to this issue is, inter alia, the ruling of the Court of First Instance of 29 June 2012 in case T-370/09 *GDF Suez SA vs. European Commission.*[9]

As indicated in the cited judgment, 'it follows from the case law that Articles 81 EC and 82 EC concern only anti-competitive actions taken by undertakings on their own initiative. If anti-competitive conduct is imposed on undertakings by national legislation or if that legislation creates a legal framework which in itself eliminates any possibility of action in conformity with the competition rules on their part, Articles 81 EC and 82 EC do not apply. In such a situation, as is apparent from those provisions, the restriction of competition does not find its cause in the independent conduct of the undertakings. By contrast, Articles 81 EC and 82 EC may be applied where it appears that national legislation leaves open the possibility that competition may be prevented, restricted or distorted by the independent action of undertakings (judgments of the Court: of 11 November 1997 in Joined Cases C-359/95 P and C-379/95 P Commission and France v Ladbroke Racing, paragraph 33, 34; of 11 September 2003 in Case C-207/01 Altair Chimica, ECR I-8875, paragraph 30, 31)'. The Court of First Instance took a similar view in case T-271/03 *Deutsche Telekom v. European Commission*.[10]

---

[9] CFI judgment of 29.06.2012, Case T-370/09 *GDF Suez SA vs. European Commission,* ECLI:EU:T:2012:333.

[10] CFI judgment of 10.04.2008, Case T-271/03 *Deutsche Telekom v. European Commission,* ECLI:EU:T:2008:101.

Applying the conclusions of the cited judgment to the Polish legal system, and the issue of approval of tariffs by the President of URE, it must be concluded that the provisions of the ELA and the tariff regulation do not give freedom of action to an energy company operating in the heat market. Such an entity is obliged to submit for approval tariffs calculated in accordance with the provisions of the ELA and the tariff regulation, and only approved tariffs may be introduced into force. In addition, the approved tariffs are rigid in nature, which means that the energy company cannot legally apply lower prices and rates than those approved in the tariff by the President of URE. Moreover, the tariffs of district heating companies are usually interlinked (and they are always interlinked in case of a generator and distributor of heat), as in the factual situation which is the subject of the decision of the President of UOKiK (para. 15 of the Decision). It should, therefore, be recognised that Polish legislation has created a legal framework, which by itself eliminates any possibility of acting in accordance with the rules of competition. Therefore, Article 6 of the PCA, as well as Articles 101 and 102 TFEU and the provisions of the PCA should not apply to the decision under review, because the cause of the restriction of competition is not found in the independent actions of the heating companies.[11]

There is also a well-established view, both in Polish case law and literature, that it is not possible to consider actions taken on the basis of decisions of regulatory authorities as a practice restricting competition or abuse of a dominant position. Such view was presented primarily in the context of cases where the application of rates and charges resulting from a tariff approved by a regulator was questioned. In the judgment of 20 May 2002 (ref. no. XVII Ama 92/01) the Antimonopoly Court[12] stated that the President of UOKiK is not competent to challenge tariffs approved by the President of URE. In the justification of the judgment, the court emphasised that approved tariffs are assessed by the President of URE in terms of their compliance with the applicable law. The object of assessment in proceedings for the approval of a tariff is to ascertain whether it ensures coverage of the justified costs of the activity of energy companies and the protection of interests of energy consumers against an unjustified increase in prices. Therefore, there is no doubt that it is the President of URE who is competent to assess the correctness of the amount and structure of the approved tariffs. Thus, in terms of tariffs, the ELA has the nature of *lex specialis* in relation to the provisions of the PCA. A systemic interpretation of the relevant provisions of these laws, taking into

[11] CJ judgment of 11.11.1997, Joined Cases C-359/95 P and C-379/95 *P Commission and France v Ladbroke Racing,* ECLI:EU:C:1997:531, para. 33 and the case law cited therein.

[12] Currently the Regional Court in Warsaw – the Court of Competition and Consumer Protection (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter: SOKiK).

account the principle *lex specialis derogat legi generali*, dictates, in the court's opinion, that a situation in which two authorities rule differently on the same issue is impossible under the rule of law. Therefore, it is not permissible for the President of URE to approve the tariffs and the President of UOKiK to undermine them by an antitrust decision. A different interpretation of the provisions referred to here could result in a breach of the constitutional principle of confidence in the State. It could also potentially lead to a situation where a penalty would be imposed for acting in accordance with a positive decision issued by the competent authority, called upon to rule on the legality of the tariff, that is, its compliance with the applicable law. The Supreme Court ruled similarly in its judgment of 7 April 2004, ref. no. III SK 27/04).

In Polish jurisprudence, a view has also emerged which has taken a position similar to the so-called 'occupied field doctrine'.[13] It may be concluded from the judgment that as long as 'a regulation has not been made' (that is, there is no ruling by the regulator), both the President of UOKiK and the regulator are competent to hear the case. However, if a regulation has been made, the President of UOKiK is no longer in a position to issue antitrust decisions, as this would lead to a breach of the constitutional principle of citizens' trust in the StatIrrespective of the fact that in the case of heating companies a decision of the President of URE regarding tariffs is always in force (as indicated above, until the date of entry into force of a new tariff, the existing tariff is applied), this position has been criticized in literature and jurisprudence.

Referring to the theses of the above judgment, it needs to be pointed out that individual provisions of sectorial regulation must be treated as *lex specialis* in relation to the provisions of the PCA. Such a relationship exists wherever the provisions of laws such as the Energy Law or the Telecommunications Law constitute an autonomous and complete regulation of specific market behaviours of enterprises. The only addressees of such norms are precisely enterprises, which, due to the specifics of their operations, remain natural monopolists on a given market. With regard to these enterprises, it is in many cases the provisions of the sectorial regulation that determine how the behaviour of a monopolist is to develop. Thus, such provisions must be treated as a restriction of competition permitted under Article 3 of the PCA. Consequently, it should be concluded that wherever the provisions of sectorial regulations are sufficiently detailed to be regarded as *lex specialis* in relation to the provisions of the PCA – as long as, at the same time, the procedural provisions result in the NRA's authority to issue binding decisions – the adjudicative competence of the President of UOKiK is excluded. This applies to all situations, including those in which a decision by the regulatory authority

[13] SOKiK judgment of 7.01.2004, ref. no. XVII Ama 24/03.

has not yet been issued. In this context, adopting the interpretation presented in the cited judgment would lead to arbitrary application of the law, including the competitive application of particular laws. Such an understanding of 'competence provisions' is incorrect and thus unacceptable. (thus rightly, Baehr, Stawicki, 2005, p. 157; Muras, Szwed-Lipińska, 2004, p. 6).

The Supreme Court stated in its judgment of 25 May 2004 (ref. no. III SK 48/04) that the proceedings before the President of URE and the proceedings before the President of UOKiK are not of an alternative and equal nature, serving in each case to protect the same legally protected interests (public interest or interest of the consumer) of the energy consumer, who, in a particular case, would have to decide on his/her/its own about which of the two ways of legal protection to use. In the court's opinion, the competences of the President of URE and the President of UOKiK are legally distinct, although complementary to each other. The President of UOKiK is an authority with general competence in the field of competition and consumer protection, unless provisions have expressly reserved certain competences in this field for another authority – including the President of URE. Notwithstanding the above, to the extent not regulated by the provisions of the ELA, an electricity consumer may use legal remedies – defined by the provisions of the PCA – in this case, the provisions on practices restricting competition as a result of an abuse of a dominant position. In the same ruling, the Supreme Court confirmed that prices and tariff rates set by an energy company, which are binding as a result of their approval by a decision of the President of URE and their subsequent proper announcement, cannot be subject to control in proceedings conducted by the President of UOKiK under the provisions of the PCA. Moreover, as indicated in the judgment, 'The application by an energy company, as is the case here, of prices or rates of charges set out in a tariff approved by the President of the URE and correctly announced (Article 47 in conjunction with Articles 44, 45 and 46 of the ELA) (…), cannot in any event be assessed as an abuse of dominant position involving the imposition of an "unfair price" – the more so in the case when the consumer of energy does not question the correctness of the way in which it was classified to the group of recipients specified in the tariff'.

It may be concluded from the cited judgment that the provisions of the ELA concerning the approval of tariffs constitute *lex specialis* in relation to the provisions of the PCA to the extent that they constitute an exhaustive regulation of certain conduct. The President of UOKiK is not competent to rule on such matters, regardless of whether the regulation has already taken place (the regulator's decision has been issued) or not. Where, however, there is no specific regulation or the regulator lacks jurisdiction, the President of UOKiK may intervene.

As indicated in the literature, within the scope not regulated by the provisions of the ELA, certain entities may always use the legal protection measures specified by the provisions of the PCA. This possibility is certainly excluded by comprehensive regulations relating to prices and tariffs set by energy companies, which cannot be the subject of control in proceedings conducted under the PCA before the President of UOKiK. By issuing decisions in matters reserved for the exclusive competence of the President of URE, the President of UOKiK would be committing a breach of Article 7 of the Constitution of the Republic of Poland, which expresses the principle of public authorities acting on the basis and within the limits of the law. Moreover, it should be remembered that an inaccurate decision issued by an unauthorised body is invalid under Article 156 of the Polish Code of Administrative Procedure, and such an action, from the point of view of liberalisation of the broadly defined energy market, may bring more harm than good. It should therefore be stated that some of the very important powers of the President of UOKiK, exercised in relation to various sectors of the economy which are subject to antitrust law, are exercised in relation to the energy sector by way of exclusive and authoritative decisions issued only by the President of URE (reasonably: Muras, Szwed-Lipińska, 2004).

Referring the above to the decision in question, it should be pointed out that the President of URE is the body responsible for regulating and protecting competition on the market for district heat, among others due to the existence of a natural monopoly on this market. The President of URE, using granted regulatory instruments, substitutes market mechanisms.

Effective and fully open competition is not possible in the district heating sector. Economic and technical conditions mean that there is no competition on the market for district heat, which means that there is no room for measures to protect competition, especially on prices. The rules for tariffs in the district heat sector determine the exclusivity of the President of URE in this respect.

## V. Can coordination between a generator and a distributor on tariffs be challenged by the President of UOKiK?

In the context of the above analysis, and the conclusions which follow from it, can it be inferred that the cooperation between the producer of heat and its distributor in the process of determining tariffs was an agreement restricting competition or part of such an agreement? As it results from the content of the Decision (paras. 164–167), changes in tariffs, in particular those of the producer PGNIG Termika – approved by the President of URE – were, in the

opinion of the President of UOKiK, an element of an agreement restricting competition.

It is important to outline here the specificity of the cooperation of heating companies operating in the heat market caused by the tariffing process. First of all, it should be pointed out that cooperation and coordination between the heat producer and its distributor is necessary and primarily informative. The data and information on the heat generator's tariff are necessary for the distributor to correctly and legally prepare the application for tariff approval, and to take into account the amount of costs and revenues that are necessary for the tariff calculation. Such cooperation should in principle be qualified as an obligation of the heat producer and distributor resulting from the provisions of the ELA, the tariff regulation and the regulatory practice of the President of URE, which requires these entities to exchange information necessary for correct tariff calculation. This is also confirmed by the decision of the President of UOKiK, which indicates that the tariffs of PGNIG Termika and Veolia Warszawa have been linked (paras. 49–54).

Moreover, since cooperation and coordination in the process of shaping tariffs is essential in the process of determining and approving heat tariffs, such behaviour cannot be, and is not penalised directly either in the PCA or in the ELA. Pursuant to Article 56(1)(5), (5a) and (6) of the ELA, whoever:

'5) applies prices and tariffs without complying with the obligation to submit them to the President of URE for approval referred to in Article 47,

5a) does not submit for approval a tariff contrary to the request of the President of URE referred to in Article 47(1),

6) applies prices or rates of charges higher than those approved, or applies the tariff contrary to the conditions set out therein',

is subject to a fine.

None of these behaviours took place in the present case, and mutual information of energy companies on the issues related to setting and approving tariffs – the producer and distributor of heat, due to the necessity of cooperation (in order to reach the consumers, the produced heat must be delivered to the heating network managed by the distributor) is advisable and even necessary for the correctness of tariff modelling. While PGNIG Termika's tariff approved by the President of URE could provide the basis for Veolia Warszawa to prepare its final tariff application for the next period, as the President of URE may request a change in prices and charges or may refuse to approve the tariff, it is indeed advisable for district heating companies whose tariffs are linked to remain in mutual communication on planned tariff actions, and this is a normal market practice. It should be borne in mind that the procedure for drawing up the tariff, and the administrative procedure itself

for approving the tariff, are lengthy and that one of the enterprises cannot wait passively for a decision approving the tariff of the other electricity enterprise, when the tariff application of the former enterprise is linked to the tariff of the later.

Secondly, cooperation between the generator and distributor is necessary to ensure the security of energy supply and the reliability of the operation of the district heating system, and such an obligation arises from the provisions of the ELA (Article 1(2), Article 9c et seq.) as acknowledged by the President of UOKiK in the Decision (para. 489). Moreover, such an obligation also arises from the terms of the concessions granted to heat companies by the President of URE for the generation, transmission and distribution of heat, which the President of UOKiK completely ignored in the text of the Decision, failing to take into account that not only legal regulations are the source of obligations of energy companies, but also decisions issued by the regulatory authority.

The basic condition for ensuring safety is for heating companies to have sufficient financial resources to carry out investments and repairs. The possession of sufficient financial resources means the proper formulation of tariffs, which is also consistent with the aim of balancing the interests of energy enterprises and the consumers of fuels and energy expressed in Article 1(2) of the ELA, including balancing the interests of energy enterprises among themselves within the value chain (generator – distributor). The above is confirmed by the judgment of the Polish Supreme Administrative Court discussed below, which states that energy companies perform public tasks by implementing State energy policy.

Also, the provisions of the PCA (Article 106) do not include sanctions for the cooperation of energy companies in the process of tariff setting because, as shown above, in the case of the energy market, including the heat market, the determinant provisions are those of the sectorial regulation, namely the ELA and the tariff regulation, which constitute *lex specialis* in relation to competition law, and the regulatory practice of the President of URE.

Therefore, in order to consider cooperation between energy (district heating) companies in the process of tariff formation as prohibited, regardless of the fact that such action would be completely unjustified, it would be necessary to amend the ELA and introduce a fine for such behaviour, which would obviously mean the abandonment of the objectives set out in the aforementioned Article 1(2) of the ELA, that is, a complete paradigm shift in the State's approach to the district heat market.

It should also be pointed out that PGNIG Termika and Veolia Warszawa indicated in the Energy Partnership Agreement of 13 November 2014, which the President of UOKiK considered to be part of the restrictive agreement, as follows: 'The parties, with a view to protecting the interests of consumers

against unjustified levels of prices and fee rates determined by the tariffs of heating companies, will inform each other [previously in the draft – will consult] about the structure of their tariffs each time before submitting tariff applications to the President of URE. The parties will inform each other of any changes to the tariffs approved [previously in the draft – submitted] by the President of URE'. Regardless of the version of this provision, whether we are talking about a signed agreement or its draft, such a provision is only a confirmation of a market practice necessary for proper formulation of tariffs of both PGNiG Termika and Veolia Warszawa. This practice is not prohibited by law and, what is more, such agreements between the parties are expected by the President of URE, precisely for the purpose of correct tariff calculation by the generator and distributor in accordance with the objectives of the ELA. Therefore, such a provision cannot be qualified as an agreement restricting competition or as part of such an agreement.

It should also be pointed out that the President of UOKiK made a mistake in the grounds of the Decision where it stated that the tariff proceedings conducted by the President of URE are closed to the public (paras. 41 and 464), which is significant in the context of the breach of legal provisions found by the President of UOKiK in the form of the conclusion of an agreement restricting competition.

According to the established case law of the administrative courts, whose cogency in Polish law includes the recognition of complaints against inaction or decisions of administrative bodies within the scope of the provisions on access to public information,[14] the data covered by the application of a heating company for approval of its heat tariff by the President of URE constitute information on public matters in accordance with the provision of Article 1(1i) of the Access to Public Information Act[15] (hereinafter: APIA). The judicature unequivocally determines that since an application for the approval of a tariff is public information, it cannot be concluded that heating companies, whose tariffs are, moreover, interrelated, cannot communicate or even cooperate with regard to the submitted applications. This aspect shows, once again, that the President of UOKiK has overlooked the specificity of sectorial regulation, which at this point no longer results only from the regulations of the ELA, but also from the provisions of the APIA. Considering the specific nature of the energy sector, where energy companies are responsible for ensuring energy security (security of fuel and energy supply) and, thus, implement State policy

[14] Act of 6 September 2001 on Access to Public Information (consolidated text Journal of Laws of 2020, item 2176) (hereafter: APIA).

[15] Thus, inter alia: Supreme Administrative Court judgment of 07.05.2019, ref. no. I OSK 2038/17 LEX no. 2680214; Supreme Administrative Court judgment of 9.03.2018, I OSK 1974/16.

by carrying out public tasks under the supervision of the President of URE, information and documents which in a competitive market would constitute company secrets, are, in this case, public information.

Finally, the President of UOKiK completely ignored the distributor's role as defined by the provisions of the ELA and its implementing regulations, namely the Regulation of the Minister of Economy of 15 January 2007 on detailed conditions for the operation of heat distribution networks (hereinafter: System Regulation).[16] Pursuant to Article 9b of the ELA, energy companies engaged in the transmission and distribution of heat are responsible for the operation of their network and ensuring its maintenance as well as for cooperating with other energy companies and customers using the networks under the conditions set forth in the System Regulation. The System Regulation, in turn, in paragraph 16, imposes on the distributor the obligation to prepare a heating operation programme, on the basis of which the operation of the heating network takes place in accordance with paragraph 18 of the System Regulation. Paragraph 17 of this act specifies in detail the manner and content of the network operation programme, stating that it should take into account the local conditions, including the operating conditions of the sources cooperating with the network, as well as the requirements of the rational use of fuels and energy, environmental protection, in a manner ensuring the minimization of the costs of heat supply to consumers.

The above is only feasible if the distributor has detailed information from generators on all aspects and plans of the operation of generation sources, both technical and economic aspects.

Summing up all the above considerations, it is necessary to refer to the statement of the Polish NCA contained in paragraph 317 of the Decision. There, the President of UOKiK points out that the subject of his assessment is not whether the rates of prices and charges contained in the tariffs of PGNiG Termika and Veolia Warszawa were calculated correctly, nor whether they were excessively high in relation to end users, as these issues were subject to the assessment by the President of URE as part of the proceedings for the approval of these tariffs. Instead, the President of UOKiK assesses whether there was any unlawful coordination between the entrepreneurs in the very process of calculating prices and their structure (relation of fixed charges to variable charges).

Such a claim cannot be accepted. The tariff process is a single entity encompassing all the events related to it. Thus, the administrative decision terminating the process relates to all its elements. There is no residue left for the President of UOKiK to deal with. Consequently, any statements made

[16] Journal of Laws of 2007, no. 16, item 92.

by the Polish NCA in relation to this process, referred to in paragraph 317 of the Decision, let alone any decisions based on such statements, constitute an unlawful interference in the tariff process and, at the same time, an infringement by the President of UOKiK of the exclusive competence of the President of URE in this process, contrary to the principle of strict separation of powers between public authorities.

As can be seen from the above considerations and the analysis in the above excerpts from the publication, the President of UOKiK did not take into account the provisions of the law on tariff approval and the regulatory practice of the President of URE, i.e. the entire specificity of sector regulation, which cannot be abstracted from in the case of the energy market, of which the heat market is a part. Therefore, at least to this extent, the Decision of the President of UOKiK is not in line with the law. It is not possible to qualify certain conduct under competition law in disregard of other provisions of the law that bind the parties to antitrust proceedings, all the more so because those provisions are special provisions and should be given precedence.

## VI. Summary

As shown above, the heat market is a market with a natural monopoly, so that no competition can be considered to exist in any segment of this market, as clearly indicated by the obligation of energy companies to submit heat tariffs to the Polish energy sector NRA – the President of URE – for approval. Effective and fully open competition is not possible in the district heat sector. It has been established that all segments of the heat market – generation, transmission and distribution, and trade – have a natural monopoly. The lack of competition in the market for district heat is also evidenced by the fact that heating companies are not exempted from the obligation to have their tariffs approved by the President of URE, pursuant to Article 49 of the ELA.

As indicated in the literature, the regulatory instrument that interferes the furthest with the legal situation of a heating entrepreneur is the issuance of a decision on the obligation to submit a tariff for approval, while the regulatory instrument that has the greatest impact on antitrust actions is the possibility for the President of URE to indicate to the entrepreneur specific price calculation methods (Banasik, 2019). Thus, in this respect, it should be considered that the Polish NCA – the President of UOKiK – has no grounds to interfere with this process.

Thus, it should also be stressed that it is impossible to consider that entrepreneurs can conclude a price agreement restricting competition with

regard to the prices set in the tariffs. Energy (heat) companies have a public and legal obligation to prepare tariffs in accordance with cost calculation regulations, and the tariffs are approved by the NRA. Thus, in fact, it is the President of URE who decides on the level of prices and charges in the tariff, as it is he who can order the applicant to reduce them; if the applicant does not agree to modify the application and reduce the rates, the President of the URE refuses to approve the tariff, which in this case cannot enter into force.

The indicated instruments of economic regulation of the sector mean that there are no grounds for the President of UOKiK to act in the area of tariffs – prices and fee rates, as the system of tariff setting and approval is based on economic regulation – and so, it is subject to the President of URE (NRA) and not the President of UOKiK (NCA).

The specific nature of the district heat market and the applicable provisions of the ELA unambiguously grant the President of URE the exclusive authority to take action on competition in the district heat sector. Moreover, the NRA also has exclusive competence with regard to price tariffs. These competencies are closely and inextricably linked. Among others, due to the existence of a natural monopoly – no competition – it was necessary to implement sectorial regulation. Thus, actions taken by the President of URE replace market mechanisms, making it possible to eliminate natural consequences resulting from the network nature of the sector, technical, technological, organisational and ownership conditions. For these reasons, the use of antitrust instruments in the district heat sector will not allow the introduction and consolidation of competition in the sector (Kraśniewski, 2020, pp. 24–25).

Moreover, if the tariffs, understood in accordance with Article 3(17) of the ELA as a set of prices and rates of charges and the conditions of their application, developed by the energy company and introduced as binding for the recipients specified in it in the procedure specified in the Act, applied for by the parties to the proceedings, were approved by the President of URE, no breach of law can be attributed to the energy companies in the form of conclusion of an agreement limiting competition, if they introduced the tariffs approved by the NRA for application. Meanwhile, the cooperation of heating companies in the process of calculating and approving their tariffs arises directly from legal provisions, and is a generally accepted market practice in the energy market, including the heat market, and is not a practice prohibited by law, which, according to the principle *quod lege non prohibitum, licitum est*, means that it is a permitted practice that cannot be sanctioned. As shown above, this cooperation is even essential for the proper drafting of tariff applications by energy companies.

In this context, one could wonder about the responsibility of the NRA as a state administration body for the infringement of competition law for,

inter alia, approving tariffs that restrict competition – accepting prices and fee rates agreed in an agreement restricting competition, in accordance with the Decision of the President of UOKiK. Such a thesis is too far-reaching, and it is difficult to find a legal basis that would directly constitutionalize such liability of the regulator in the antitrust legislation. In such a case, the general provisions of Polish civil law on the liability for damages of public authorities may be taken into account, namely Article $417^1$ § 2 of the Act of 23 April 1964 – the Civil Code[17] according to which, if damage was caused by issuing a final judgment or a final decision, its redress may be demanded after their unlawfulness has been established in appropriate proceedings, unless separate provisions provide otherwise. This shall also apply where a final judgment or decision has been issued on the basis of a normative act which is inconsistent with the Constitution, a ratified international agreement or a statute. Therefore, it is not possible to speak of the illegality or invalidity of the decisions of the President of URE approving the tariffs, if they have been issued in compliance with the regulations and the possible illegality of the decision has not been demonstrated in administrative or judicial proceedings.

To sum up, it should be stated that the communication, coordination or cooperation between the heat producer and distributor in the process of tariff calculation cannot be considered by the President of UOKiK as a practice limiting competition, in other words, as an agreement within the meaning of Article 5 of the PCA and Article 101 TFEU, or as a part of such practice, and thus cannot be considered as an illegal action that is subject to a fine. The Decision of the President of UOKiK, while focusing on legal regulations concerning antitrust law – the provisions of the PCA and the TFEU, marginalised sector regulations, that is, the provisions of the ELA, the Tariff Regulation and the regulatory practice of the President of URE, which should be applied first in the case of price regulation in the heat market, which makes the Decision defective at least in this respect.

## Literature

Baehr, J. and Stawicki, A. (2005). Rozważania wokół równoległego stosowania prawa konkurencji i instrumentów regulacyjnych. In: Banasiński, C. (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej. Publikacja jubileuszowa z okazji piętnastolecia Urzędu Ochrony Konkurencji i Konsumentów*, Bydgoszcz: UNIGRAF Bydgoszcz. Retrieved from: https://www.uokik.gov.pl/download.php?plik=12250.

Colomo, P.I. (2016). EU Competition Law in the Regulated Network Industries, LSE Law, Society and Economy Working Papers 08/2016, London School of Economics and Political Science.

[17] Consolidated text Journal of Laws of 2020, item 1740.

Dobrowolski, A. et al. (2016). In: Muras, Z. and Swora, M. (eds.), *Prawo energetyczne. Komentarz*, Warszawa: Wolters Kluwer Publishing.

Dobroczyńska, A. et al. (2001). *Regulacja energetyki w Polsce*, Toruń: Wydawnictwo Adam Marszałek.

Hoff, W. (2008). *Prawny model regulacji sektorowej*, Warszawa: Difin.

Kraśniewski, M. (2020). Dylematy sektora ciepła systemowego, czyli kilka słowa o konkurencji i monopolu w ciepłownictwie *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 6(9, https://doi.org/10.7172/2299-5749.IKAR.6.9.1.

Muras, Z., Szwed-Lipińska, K. (2004). Rozstrzyganie sporów z zakresu TPA – uprawnienia Prezesa UOKiK w świetle kompetencji Prezesa URE, *Biuletyn Urzędu Regulacji Enrgetyki*, 4. Retrieved from: https://prawo.cire.pl/pliki/2/rozstrzy_spor.pdf.

Pawełczyk, M. (2020). Komentarz do art. 3. In: Czarnecka, M., Ogłódek T. (eds.), *Prawo energetyczne. Ustawa o odnawialnych źródłach energii. Ustawa o rynku mocy. Komentarz*, Warszawa: C.H. Beck.

Skoczny, T. (2003). Stan i tendencje rozwoju prawa administracji regulacyjnej w Polsce. In: H. Bauer et al., *Ius Publicum Europeum, Dwunaste Polsko-Niemieckie Kolokwium Prawników-Administratywistów*, Warszawa: Wydawnictwo Prawo i Praktyka Gospodarcza.