

Erroneous charging inconsistent with tariff conditions justifies administrative fine



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Introduction

In a recent judgment, the Supreme Court applied Article 56(1)(6) of the Energy Law, clarifying when the Polish regulator (ie, The President of the Energy Regulatory Office) can impose an administrative fine on an energy company. **(1)** The Supreme Court dealt with a situation where the tariff applied was contrary to the conditions specified therein. The court's verdict is a reminder for energy companies operating in Poland that administrative fines also apply in situations other than when the prices or fee rates are higher than approved.

Facts

On 30 August 2012 the President of the Energy Regulatory Office imposed an administrative fine on energy company PSA amounting to 0.018% of its total revenue in 2011, equating to PLN1.5 million. The administrative body concluded that PSA had applied the relevant tariff contrary to the conditions specified therein in relation to customers in Tariff Group G. The evidence demonstrated that between 2008 and 2011, PSA had applied reference (billing) periods contrary to the tariff. In addition, an analysis of the invoices showed that in the first half of 2011, PSA had applied service charge rates assigned to other reference periods than those effectively applied. Consequently, customers incurred excessive charges, to the benefit of PSA. After lengthy proceedings pending before the first-instance court and the court of appeals, the case ultimately found its way to the Supreme Court. The pivotal issue to be determined was whether the trading company could be fined for the incorrect application of the distribution system operator's tariff as far as the proper charging of the distribution fee was concerned.

Decision

The legal grounds for the abovementioned decision issued by the President of the Energy Regulatory Office are set out in Article 56(1)(6) of the Energy Law, which provides that:

[a]n administrative fine shall be imposed on anyone who applies prices or rates higher than approved or applies a tariff contrary to the terms and conditions specified therein.

The Supreme Court explained that under Polish law, the supply of electricity may be effectuated based on:

- two different agreements concluded separately with a trading company and a distribution system operator (a contract of electrical energy sale and a distribution services contract); or
- one agreement regulating both the sale and distribution of electricity (a comprehensive contract of the sale and distribution of electrical energy).

PSA supplied electricity to its customers under comprehensive contracts. Each electricity fee consisted of two basic components:

- an active energy fee (the amount of which depended on the level of electricity consumption by the consumer); and
- a distribution fee (covering the broadly understood costs of supplying energy to the consumer, borne by the distribution system operator).

In the case of the tariff for households (Tariff Group G), a trading company providing services under a comprehensive agreement is responsible for collecting the entire fee from customers, with the fee for active energy constituting part of its revenue and the remaining part of the fee (including the variable distribution fee, the fixed distribution fee, the transitional fee and the service charge) being transferred to the distribution system operator. Therefore, a trading company acting under a comprehensive agreement must apply its own tariff for the active energy fee and apply the distribution system operator's tariff for the distribution fee.

The Supreme Court reiterated that the tariff stands for a set of prices and fee rates, as well as the conditions for their application, developed by the energy company and binding for the concerned customers. Consequently, the Supreme Court held that the court of appeals' interpretation of Article 56(1)(6) of the Energy Law, assuming that this provision concerns "their own tariff, not the tariff of the third party", was incorrect. In the Supreme Court's view, if a trading company – under a comprehensive agreement – applies the tariff of the distribution system operator in terms of the distribution fee, this tariff must be applied in full conformity with its terms and conditions. Otherwise, the administrative fine set out in Article 56(1)(6) of the Energy Law may be effectively imposed on the trading company. The Supreme Court's reasoning relates to the situation in which a trading company has concluded comprehensive agreements with its customers.

The Supreme Court also stated that PSA – in accepting reference (billing) periods for settlements with customers inconsistent with the distribution system operator's tariff and settling fixed fees in the event of changes in the fee rates during the reference (billing) period in a manner inconsistent with the distribution system operator's tariff – had applied the tariff of the latter operator inconsistently with the conditions specified therein. The Supreme Court noted that PSA had made unfounded profits from the described operation. For this reason, the trading operator was ultimately fined for an administrative tort.

However, the Supreme Court also reaffirmed that the President of the Energy Regulatory Office does not always have to impose the described administrative fine on energy companies. In each case, where the premises to apply Article 56(1) of the Energy Law are fulfilled, the regulator should consider whether there are grounds to refrain from imposing a fine. This can happen when the detrimental effect of the act is insignificant and the energy company has ceased to infringe the law or has fulfilled its obligation.

Comment

The Supreme Court's application of Article 56(1)(6) of the Energy Law will have an important impact on similar administrative proceedings against trading companies. This case demonstrates that this provision is ambiguous and has thus been interpreted differently depending on the court. The Supreme Court's judgment sends a clear message to trading companies acting on the basis of a comprehensive agreement: they must apply both their own and the distribution system operator's tariff in full conformity with the terms and conditions provided therein. If not, they are exposed to an administrative fine from the regulator.

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Endnotes

(1) Supreme Court, 22 January 2020, I NSK 93/18, available here in Polish.

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