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THE PROVISION OF HEAT, ELECTRICITY AND GASEOUS FUELS AS A MUNICIPAL TASK

INTRODUCTION

Heat energy, electricity and gaseous fuels are commodities of primary importance, not only for the economic and developmental spheres but above all for the well-being of individuals. Making these energy carriers available guarantees stable functioning of their users, both individually and in social life. For this reason, besides the theoretical dimension, the practical aspect of this issue is extremely significant, and making these goods available is of strategic importance to the State.

The issue of energy provision is addressed at the statutory level in the act of 8 March 1990 on local self-government,¹ and the act of 10 April 1997 known as Energy Law,² a fact which reflects the weight of the issue. The said acts provide that the provision of heat, electricity and gaseous fuels occurs at the local level, but this process also has a regional and national impact.

The laws mentioned above impose the duty to provide energy carriers chiefly on communes (*gminy* ≈ municipalities) in Poland. This duty is a manifestation

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¹ Act of 8 March 1990 on local self-government, Journal of Laws of 2017, item 1875 as amended [hereafter LSG].

² Act of 10 April 1997 (Energy Law), Journal of Laws of 2017, item 220 as amended [hereafter EL].

of a principle rooted in administrative law, derived from art. 164 para. 3 of the Constitution of the Republic of Poland of 2 April 1997,³ the subsidiarity principle underpinning the territorial division in Poland.⁴ In accordance with it, the realisation of public tasks shall be entrusted to institutions of the lowest tier as ones having the closest ties with local inhabitants since it is units of local administration which have the best understanding of citizens' daily needs and know the best methods to satisfy them. The satisfaction of these needs exceeds the capabilities of individual people. Consequently, the commune is entrusted with the task of providing energy, electricity and gaseous fuels – being the basic unit of Polish local administration.⁵

The fact that the duty of provision is imposed on the commune exemplifies the important role it plays in the process of fulfilling the needs of the local community as well as the status of municipal government in the country. Having been given this kind of tasks, described by the literature as tasks of economic nature, these governmental units can actively participate in the State economy.⁶

Nevertheless, the commune is not the only entity engaged in the process mentioned above. Apart from municipal government, an important role for the provision of heat, electricity and gaseous fuels is also played by private-law entities represented by electricity undertakings. This stems from the fact that local government as an entity operating under public law does not have adequate capabilities, neither financial nor organisational, to discharge this duty on its own. As a result, it is permissible to use forms of private law as measures making the performance of public tasks possible.

The principal aim of this article is to discuss the question of municipal tasks with respect to the provision of energy carriers. The article will not address other units of local government possessing negligent [at the level of *województwo* or voivodeship ≈ province] or no impact [*powiat* ≈ county] whatsoever.

³ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws, No. 78, item 483 as amended. [hereafter Constitution].

⁴ M. STAHL, "Samorząd terytorialny," in *Prawo administracyjne, pojęcia, instytucje, zasady w teorii i orzecznictwie*, 4th ed., ed. M. Stahl (Warsaw: Difin, 2009), 398.

⁵ Z. LEOŃSKI, *Zarys prawa administracyjnego*, 2nd ed. (Warsaw: Wydawnictwo Prawnicze Lexis Nexis, 2006), 45.

⁶ W. GONET, *Zakres swobody zawierania umów przez jednostki samorządu terytorialnego*, LEX 2011, no. 127967.

1. THE NOTION OF MUNICIPAL TASKS

The task of providing energy carriers is one of the numerous tasks that the government of a commune is entrusted with. The term “tasks” is used by the legislator when it indicates goals which should be attained by units of local self-government or when it determines particular lines of development with regard to the substantive scope of matters addressed by such units.⁷ These “tasks” are laid down in a general manner by art. 163 of the Constitution, in which the constitutional legislator ruled that “local government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities.” The constitutional norm we have just invoked is elaborated and specified in the provisions of the act on municipal self-government, that is art. 2 para. 1 LSG concerning the performance of “public tasks” by a municipality. Being “public” by nature, such tasks are aimed at meeting the collective needs of a local community, and the units of local government should above all take into consideration the overall good of the commune residents as well as social interest.⁸

The task of providing heat, electricity and gaseous fuels can be no doubt classified as a public task. This is so because the obligation of its implementation is imposed on units of local government to satisfy the collective needs of inhabitants living in a particular commune. By doing such tasks, organs of the municipality should be committed to the general welfare of the inhabitants of this territorial unit. As a result the attribute of “publicness” with respect to tasks imposes the obligation of respecting the pre-eminence of general welfare over individual good.⁹ What is more, the “public” character of the task in question – as opposed to “private” character – signifies general accessibility of the outcomes of its implementation.

Another aspect of a public task is its inclusion in the domain of the State’s obligations. However, it is possible to hand over such tasks to other entities which are not public since the State entrusts them with the performance of certain tasks or certain operations as part thereof.¹⁰ In the case of the said obligation to supply energy carriers, other than municipalities (as state entities) there will also be electricity undertakings (entities based on private law).

⁷ LEOŃSKI, *Zarys prawa administracyjnego*, 143.

⁸ M. STAHL and E. OLEJNICZAK-SZAŁOWSKA, *Samorząd terytorialny. Podstawowe zagadnienia* (Warsaw: Wydawnictwo Samorządowe Fundacji Rozwoju Demokracji Lokalnej, 1994), 34.

⁹ LEOŃSKI, *Zarys prawa administracyjnego*, 144.

¹⁰ M. STAHL, “Cele publiczne i zadania publiczne,” in *Koncepcja systemu prawa administracyjnego*, ed. J. Zimmermann (Warsaw: Wolters Kluwer, 2007), 97–98.

Besides the notion of “public task,” art. 6 para. 1 LSG employs the term “public matters of local importance”, thus distinguishing between the two terms. It is commonly argued in the doctrine and case law that the legislator identifies “public matters of local importance” with municipal tasks, especially own tasks of a commune.¹¹ It is accepted that the notion of “matter” in this context has a casual sense and is conceived as an area of operation of public administration,¹² or as a certain capacity of an organ which is a competence to deal with matters of one kind.¹³ This general interpretation of the notion stems from the fact that the provision of art. 6 para. 1 LSG contains norms which only generally indicate tasks carried out by a municipality. The regulation in question contains norms of task-like rather than competence-like character, which essentially cannot underlie any municipal operations of sovereign nature.¹⁴ The notion of “matter” under our scrutiny should be distinguished from the notion of “case” as interpreted in light of the Code of Administrative Procedure. In this context this sense is absent.¹⁵

The public tasks at hand are realised by the municipal government on the basis of the competences it has. The very notion of “competence” is not used in provisions of law. In contrast, the doctrine defines them as a bundle of rights (entitlements) and obligations of a state authority such as legal forms of operation, mainly of sovereign character, unlike the legal forms used for the realisation of local government’s tasks.¹⁶ Reference is made to them only partially in municipal laws by defining the exclusive jurisdiction of an authority.¹⁷ However, these laws do not define legal forms designed for the implementation of a particular task. The case law¹⁸ points to art. 7 para. 1 LSG as a competence norm thus interpreted, but this provision specifies merely the range of tasks carried out for the benefit of a commune including those involving the supply of energy carriers (para. 1 point 3 of art. 7 LSG); still

¹¹ T. BĄKOWSKI, “«Zaspokajanie zbiorowych potrzeb wspólnoty», «zadania własne gminy», «zakres działania gminy» oraz «sprawy publiczne o znaczeniu lokalnym» w rozumieniu przepisów art. 6 i 7 ustawy o samorządzie gminnym,” in *Studia prawno-administracyjne. Księga jubileuszowa Profesora Eugeniusza Bojanowskiego*. Gdańskie Studia Prawnicze 6, ed. T. Bąkowski and K. Żukowski (Gdańsk: Uniwersytet Gdański, 2012), 45–46.

¹² J. ZIMMERMANN, *Prawo administracyjne*, 5th ed. (Warsaw: Wolters Kluwer, 2012), 231.

¹³ LEOŃSKI, *Zarys prawa administracyjnego*, 143.

¹⁴ Judgement of the Provincial Administrative Court in Poznań dated July 16, 2014, file ref. no. IV SA/Po 507/14, LEX no. 1498465.

¹⁵ ZIMMERMANN, *Prawo administracyjne*, 231.

¹⁶ LEOŃSKI, *Zarys prawa administracyjnego*, 143; ZIMMERMANN, *Prawo administracyjne*, 230.

¹⁷ LEOŃSKI, *Zarys prawa administracyjnego*, 145.

¹⁸ Judgement of the Supreme Administrative Court in Warsaw dated August 10, 2012, file ref. no. I OSK 1096/11, LEX no. 1217247.

it does not indicate legal forms for the realisation of these tasks. These forms are defined in substantive law,¹⁹ chiefly by art. 19 and 20 EL. These solutions specify measures to be undertaken by the head of a commune (Pol. *wójt*) (or the mayor of a town/city) and the commune council.

Competences, as legal forms of public task implementation, cannot be transferred to another entity, unless permitted by the law.²⁰ As regards the supply of heat, electricity and gaseous fuels, the Energy Law, while indicating the competences of municipal authorities in this respect, does not permit other public authorities to realise this task. For example, the law reserves the competence to draft the basic premises for a provision plan to a single-person authority represented by *wójt*, so this cannot be done by such a body as the commune council. Such a division of competences is conditioned by the nature of specific organs, and it is intended to maintain specific legal order. On the other hand, in a situation where a legal act is performed by an incompetent (i.e. unauthorized) authority, we deal with nullity of an act.²¹

Seen from the doctrinal perspective, the task of supplying energy carriers is undoubtedly a public task, the delivery of which is assigned to public entities indicated by the provisions of the law on local self-government. Its realisation hinges on the competences granted to these entities, mainly by the Energy Law.

2. THE NATURE OF MUNICIPAL TASKS REGARDING THE PROVISION OF HEAT, ELECTRICITY, AND GASEOUS FUELS

Public tasks can be included in the category of own or commissioned tasks on the basis of the criteria specified in local government legislation. Own tasks are defined in art. 166 para. 1 of the Constitution as ones “aimed at satisfying the needs of a self-governing community.” Art. 7 para. 1 LSG uses a similar approach to this kind of tasks, providing that they are intended to “satisfy the collective needs of a community.”

¹⁹ Judgement of the Supreme Administrative Court in Warsaw dated July 20, 2012, file ref. no. I OSK 843/12, LEX no. 1218321. “Each of the scopes of matters referred to in art. 7 para. 1 LSG is to be acknowledged and specified by a separate law regulating matters concerning municipal tasks.” Judgement of the Supreme Administrative Court in Warsaw dated February 10, 2015, file ref. no. I OSK 2343/14, LEX no. 1753339: “the provision of art. 7 para. LSG, which determines the scope of matters addressed by the commune as its own tasks, «in itself does not create specific rights and cannot constitute an independent basis for the issuance of specific legislative acts. Such competences must be derived from separate statutory provisions which authorise the commune to undertake specific measures to deliver its tasks».”

²⁰ LEŃSKI, *Zarys prawa administracyjnego*, 145.

²¹ *Ibid.*, 146.

It is pointed out in the doctrine that the term “satisfaction”, which appears in both regulations has a crucial role to play with respect to own tasks and is a guideline for a municipal council. In view of the above, the concept of “activities intended to satisfy public needs” is conceived as activities which truly meet the needs of the local community. When carrying out its own tasks, the municipal government should undertake concrete measures aimed at satisfying specific needs rather than predicting potential solutions to problems which may crop up in the future.²²

It is assumed that the criterion for the isolation of own tasks is the manner of their performance. If it is unnecessary to carry out a particular task in a consistent manner and according to uniform rules throughout the country, it can be regarded as a particular local government’s own task. In contrast, if a particular task has to be realised in accordance with uniform rules and in a standardized manner throughout the country, it can be regarded as a commissioned task.²³

In a situation where a public task is qualified as a municipal own task, it becomes necessary for the municipality to perform it with the use of its own funds, on its own behalf and on its own responsibility. This demonstrates the independence of Polish communes in terms of task performance and, pursuant to the Constitution (art. 165 para. 2), which is subject to judicial protection.²⁴

The provision of energy carriers is classified as a commune’s own task pursuant to the act on self-government, in which art. 7 para. 1 provides a catalogue of municipal own tasks, and para. 3 mentions the provision of heat, electricity and gaseous fuels. This provision is further specified in art. 18 para. 1 EL, which lays down municipal own tasks in respect of provision of energy carriers. These are:

- 1) the planning and organisation of the system of energy provision in the territory of a commune;
- 2) the planning of the lighting network for public places and roads within the area a commune;
- 3) the planning of the lighting network for streets, squares and roads within the area of a commune;
- 4) the planning and organisation of activities intended to make energy consumption more efficient and to promote solutions reducing energy consumption in the area of a commune.

The regulation contained in art. 18 para. 1 EL indicates a range of activities delegated to municipal government. In principle, own tasks, such as the provision

²² ZIMMERMANN, *Prawo administracyjne*, 200.

²³ STAHL, “Samorząd terytorialny,” 399.

²⁴ GONET, *Zakres swobody zawierania umów*.

of energy carriers, are carried out by communes in place of the State. This duty is delegated to local government due to its nature. It should be noted that not all operations involved in this task can be performed solely by the commune. Municipal operations are mainly focused on planning activities, while investment activities will practically exceed the financial capabilities of this entity.²⁵

The provision referred to above raises many doubts among representatives of the doctrine. Firstly, because the tasks it enumerates do not have much in common with one another except for the fact that they are entrusted to the same entity (commune).²⁶ Doubts about the rationality of the solution laid down by the provision arise also in connection with the exemption of municipalities from the duty to provide lighting of public places and roads, while they are obliged to plan and organise a supply of energy carriers in their area.²⁷ In this respect, the municipality also has limited financial obligations since it is under the obligation to finance the supply of energy carriers.

More doubts arise when an attempt is made to qualify of the above-mentioned tasks. The doctrine does not unambiguously determine whether these tasks should be treated as compulsory or optional (facultative).²⁸ The first category is addressed by art. 7 para. 2 LSG, which provides that “the laws specify which own municipal tasks are compulsory.” Essentially, this regulation is intended to guarantee public services to local communities at a minimal level.²⁹ Compulsory tasks are those which must be realised and their scope is delimited by the area of fundamental needs of the local residents.³⁰ In other words, those basic needs which cannot be provided for solely by the commune itself – conceived as either its constituent individual entities or a community – have to be satisfied. As a result, a compulsory task must be performed independently of any political, economic or social considerations. This constitutes a sort of guarantee for citizens that their vital needs will be provided for.³¹ As a result of qualifying those tasks as compulsory, the commune would not be able to evade them or in any way restrict this obligation since it would have

²⁵ M. CZARNECKA and T. OGŁÓDEK, *Prawo energetyczne. Komentarz*, 2nd ed. (Warsaw: Wydawnictwo C.H. Beck, 2012), 487.

²⁶ *Ibid.*, 473.

²⁷ K. ZIEMSKI, *Energetyka a samorząd. Prawne uwarunkowania rozwoju energetyki lokalnej w Polsce* (Poznań: Wydawnictwo Naukowe UAM, 2012), 13–15; A. WALASZEK-PYZIOŁ, *Energia i prawo* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 2002), 90.

²⁸ ZIEMSKI, *Energetyka a samorząd*, 13.

²⁹ Z. NIEWIADOMSKI and W. GRZELCZAK, *Ustawa o samorządzie terytorialnym z komentarzem oraz teksty innych ustaw samorządowych* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 1990), 12–13.

³⁰ STAHL and OLEJNICZAK-SZAŁOWSKA, *Samorząd terytorialny. Podstawowe zagadnienia*, 34.

³¹ ZIMMERMANN, *Prawo administracyjne*, 232.

to perform them, while a member of the municipal community (a resident of the commune) would be entitled to demand that these tasks be effectively performed.³²

Pursuant to art. 7 para. 2 LSG, compulsory tasks are specified elsewhere besides the law on self-government. This is typically regulated by provisions of substantive law. With respect to the said task of provision, this solution was adopted by the legislator who detailed the commune's tasks in art. 18 EL mentioned above. This provision, however, does not specify directly that compulsory tasks are at stake.

The compulsory character of the duty to cover the cost of municipal lighting, which rests on communes as laid down by art. 18 para. 1 point 3 EL, was addressed by the Supreme Court in its judgement of January 31, 2014, in which the Court juxtaposed the said art. 7 para. 2 LSG with art. 18 EL.³³ Nonetheless, it did not make reference to the other tasks mentioned in art. 18 EL except for the duty to pay for lighting. The approach taken by the Court in this case suggests that we are dealing with a compulsory municipal task, which cannot be ignored by the municipality. This judgement might give rise to the conclusion that the other duties mentioned in art. 18 EL will have the same character.

The doctrine and case law also point out that the municipal task referred to in art. 18 EL is not only compulsory but also absolute. The absolute character of the obligation stems from the responsibility which the commune bears for its performance,³⁴ since in this case the municipal government is an entity obliged to achieve a certain result, that is satisfaction of the needs of its inhabitants in terms of energy provision. The commune's responsibility for the final result stems from art. 7 LSG, which uses the term "satisfaction" in the context of residential needs. This duty cannot be limited merely to attempts to realise an entrusted task.

Speaking of a duty to provide energy carriers, we need to consider the distinction between "provision" and "supply." Such a distinction is made by the Supreme Court in its judgement of February 7, 2002.³⁵ Whereas the first is a statutory obligation of

³² Judgement of the Appeal Court in Kraków dated September 30, 2016, file ref. no. I ACa 1195/15, LEX no. 2157885; NIEWIADOMSKI and GRZELCZAK, *Ustawa o samorządzie terytorialnym*, 12–13.

³³ Judgement of the Supreme Court dated January 31, 2014, file ref. no. II CSK 183/13, LEX no. 1458712. The Supreme Court concludes that "art. 7 para. 1 of the act of 8 March 1990 on local self-government implies that the provision for the collective needs of the community, including the supply of electricity, is a municipal own task, subject to art. 7 para. 2 which provides that separate laws specify which municipal tasks have a compulsory character. Art. 18 para. 1 EL provides that one of the commune's own tasks in respect of electricity supply is to finance the lighting of streets, squares and public roads located therein.

³⁴ See WALASZEK-PYZIOŁ, *Energia i prawo*, 89; for a different view, see CZARNECKA and OGLÓDEK, *Prawo energetyczne*, 474–75.

³⁵ Judgement of the Supreme Court dated February 7, 2002, file ref. no. I CKN 1002/99, LEX no. 53157.

a municipality mentioned in art. 18 EL, the other (supply of electricity) is not. In the Court's opinion, the essence of the duty to provide energy is organisation and planning of such provision.³⁶ All other activities, including the supply of energy carriers, are excluded from this scope. A distinction between the two notions is also noticeable in the Energy Law.³⁷ Art. 3 point 8 EL defines provision of heat, electricity and gaseous fuels as "processes related to the supply of heat, electricity and gaseous fuels to customers." For this reason, the notion of "provision" encompasses some processes occurring besides the very process of supply but still related to it, which will ultimately lead to the consumption or reception of fuel or energy by recipients.

The provision of energy carriers, being a complex process, comprises a range of elements, such as technical or infrastructural processes, investment planning, forecasts of heat, electricity and gaseous fuels consumption. In contrast, operations related to the supply of energy consist in financing both technical and infrastructural processes.³⁸ In light of art. 18 EL, the financing of energy supply lies outside the scope of municipal obligations (the commune is obliged to plan and organise such provision). The supply of financial assets will therefore be the responsibility of external entities.

If we talk about operations associated with the provision of electricity, heat and gaseous fuels, we must also bear in mind that we are dealing with a task which has a public utility value. This follows from art. 9 para. 4 LSG, which provides that public utility tasks are the municipal tasks specified in art. 7 para. 1 LSG. Within the meaning of art. 1 para. 2 of the act of 20 December 1996 on municipal management³⁹ public utility tasks are ones for "ongoing and uninterrupted satisfaction of collective needs of the inhabitants by way of providing widely available services." Therefore, to meet the needs of its residents, a commune will be able to undertake such a task as part of its economic operation pursuant to art. 9 para. 2 LSG. Such an economic operation can be pursued by municipal legal entities and organisational units without legal personality.⁴⁰

³⁶ Similarly in P. ORZECH and M. STEFANIUK, "Komentarz do art. 18 ustawy – Prawo energetyczne," in *Komentarz do art. 12–72*, vol. 2 of *Prawo energetyczne*, ed. Z. Muras and M. Swora, 2nd ed. (Warsaw: Wolters Kluwer, 2016), LEX no. 302077.

³⁷ Ł. MŁYNARKIEWICZ, "Zaopatrzenie wspólnoty lokalnej w ciepło, energię elektryczną i paliwa gazowe," in *Pozycja ustrojowa organów wykonawczych jednostek samorządu terytorialnego*, ed. M. Stec and K. Małysa-Sulińska, LEX 2014, no. 208428.

³⁸ *Ibid.*

³⁹ Act of 20 December 1996 on municipal management, Journal of Laws of 2017, item 827 as amended [hereafter MM].

⁴⁰ T. KOCOWSKI, *Współdziałanie gminy i przedsiębiorstwa energetycznego w zaopatrzeniu mieszkańców w paliwo energetyczne*, LEX no. 82432/1; LEONSKI, *Zarys prawa administracyjnego*, 149–50.

Neither the doctrine nor case law specifies unambiguously the characteristics of the task of heat, electric and gaseous energy provision. Undoubtedly, this task is the commune's own task having some public utility. The postulate to treat it as a compulsory task is highly debatable. Given the arguments provided above, however, it seems that we will have to accept that the task of providing energy carriers rests with the municipal government although it does not have to achieve that with its own devices.

3. THE PERFORMANCE OF THE TASK OF PROVIDING HEAT, ELECTRICITY AND GASEOUS FUELS

The task of providing heat, electricity and gaseous fuels is a complex issue. This complexity derives from the multiplicity and diversity of activities which this process entails.

Municipal government is entrusted with the task of energy provision. The municipality can deliver its tasks in two ways. In the first case, it can undertake the task of provision as a task with public utility value, in other words as part of its municipal management. This possibility is guaranteed by art. 2 MM which provides that such an activity can be pursued by units of local government in two forms: either as municipal budgetary undertakings⁴¹ (based on public law) or as commercial companies (utility companies).⁴² In such a case, in compliance with the judgement of the Court of Appeal in Warsaw dated October 20, 2015, the operation of the commune will consist in not only pursuing non-commercial activity (for example planning tasks imposed by the Energy Law), but also commercial activity within the limits specified by art. 9 para. 2, in other words in areas where such activity does not involve tasks other than those of public utility, unless permitted by a separate law. Therefore, as the Court of Appeal argued, "operation consisting in satisfying collective needs of a community can be qualified as economic activity as long as its object lies within the scope of such activity."⁴³

The second method of realising municipal tasks is regulated in art. 19 and art. 20 EL, which envisage a far more restricted role of the commune. In this case, the municipi-

⁴¹ The possibility of conducting this task by means of a budgetary undertaking can also be inferred from art. 14 point 3 of the act of 27 August 2009 on public finances, Journal of Laws of 2017, item 2077.

⁴² A. MALAREWICZ-JAKUBÓW and R. TANAJEWSKA, "Uczestniczenie państwa w obrocie gospodarczym na przykładzie przedsiębiorstw użyteczności publicznej oraz przedsiębiorstw komunalnych," in *Skarb Państwa a działalność gospodarcza*, ed. A. Kidyba, LEX 2014, no. 203080.

⁴³ Judgement of the Appeal Court in Warsaw dated October 20, 2015, file ref. no. I ACa 166/15, LEX no. 1929539.

pality will cooperate with entities based on private law, that is electricity undertakings, when fulfilling the duty to provide energy. In practice, these subjects largely realise tasks associated with the provision of energy carriers to commune residents. Tasks realised by private-law entities are chiefly tasks of technical nature, mainly the production, processing of energy, its transmission and distribution. Other tasks which are related to, for example, the maintenance of power devices in working order, their construction, extension or retrofit work, can be delivered by authorised private undertakings on condition that they closely cooperate with the respective municipality. Moreover, electricity undertakings play a considerable role in the process of planning new investments and forecasting demand for various types of energy while cooperating in these matters with municipalities.⁴⁴

The possibility of cooperation between communes and electricity undertakings with respect to the provision of energy, envisaged by art. 19 and art. 20 EL, is legitimate and necessary. It is so because most municipal governments are unable to carry out all tasks of such complex enterprises on their own. This is largely due to limited financial, staff and material resources.⁴⁵ The operation of non-municipal entities in the domain under our discussion hinges on the constitutional principle of subsidiarity, whereby the task of satisfying residential needs must be delegated to non-municipal enterprises only if a particular municipality is unable to do so.⁴⁶

Art. 19 and art. 20 EL specify the legal forms of operation for communes with respect to their implementation of the task of energy provision. Based on these, a municipal government can employ three non-sovereign forms: guidelines for a heat, electricity and gaseous fuels provision plan [Guidelines], a heat, electricity and gaseous fuels provision plan [Provision Plan], and contracts with electricity undertaking. The only sovereign form provided for by art. 20 para. 3 EL is a resolution adopted by the municipal council.

The first step in the implementation of the task of energy provision, pursuant to art. 19 EL, is to create two planning documents: draft Guidelines for a heat, electricity and gaseous fuels provision plan, which is submitted by the municipal executive authority (*wójt* as the mayor of a commune or *burmistrz/prezydent* as the mayor of a town/city, respectively), and then to adopt them for the Provision Plan by way of resolution passed by the municipal council. These documents must be consistent with the spatial development plan (or such a study).⁴⁷ When draft Guidelines

⁴⁴ MŁYNARKIEWICZ, *Zaopatrzenie wspólnoty lokalnej*.

⁴⁵ CZARNECKA and OGŁÓDEK, *Prawo energetyczne*, 487, 489.

⁴⁶ BĄKOWSKI, “«Zaspokajanie zbiorowych potrzeb wspólnoty»”, 42.

⁴⁷ Judgement of the Supreme Court dated November 23, 2006, file ref. no. II CSK 207/06, LEX no. 607564.

are being developed, energy undertakings are expected to make their development plans available to a relevant municipal body (drafted under art. 16 EL and consistent with the spatial development plan) and their proposals which are essential for the development of this project. One goal of cooperation between a municipal body and undertakings mentioned by the doctrine is harmonisation of their operations in the area of the commune, which directly improves the effectiveness of energy provision.⁴⁸ The guidelines for the plan (their adoption is obligatory⁴⁹) are binding only for the municipal council;⁵⁰ since they constitute an internal act, they are not binding for such entities as electricity undertakings.⁵¹

The second step in the planning process, pursuant to art. 20 para. 1 EL, has a relatively obligatory character and occurs only when the statutory criteria have been met, in other words when electricity undertakings referred to in art. 16 EL cannot ensure the realisation of the assumptions for the plans envisaged at the first stage.⁵² In this case, the executive authority of the municipality drafts two planning documents: a draft provision plan (made on the basis of the guidelines passed earlier). Now, based on that, a Provision Plan is adopted by the municipal council.⁵³ The draft plan cannot be inconsistent with the Guidelines. What is more, it should complement or give concrete form to its resolutions.⁵⁴

The Draft Provision Plan, referred to above, contains mainly proposals for certain solutions but is not binding, which makes this document hardly a legislative act.

Moreover, the doctrine seems right in claiming that the Provision Plan itself has a non-binding status with respect to electricity undertaking. Therefore it constitutes an internal act and is binding only for the bodies of municipal government. This is

⁴⁸ See WALASZEK-PYZIOŁ, *Energia i prawo*, 92.

⁴⁹ Judgement of the Court of Competition and Consumer Protection dated April 10, 2003, file ref. no. XVII, Ame 57/02, LEX no. 1727960; WALASZEK-PYZIOŁ, *Energia i prawo*, 91; CZARNECKA and OGŁÓDEK, *Prawo energetyczne*, 483.

⁵⁰ Although the doctrine manifests some doubts in this case concerning the scope of obligation for the commune, the existing 15-year planning period is not realistic given the obligation to update the plans every 3 years. See W. PELC, "Planowanie energetyczne w gminie w świetle przepisów prawa energetycznego, w tym ostatnio wprowadzonych zmian," *Finanse Komunalne* 6 (2010): 41.

⁵¹ WALASZEK-PYZIOŁ, *Energia i prawo*, 9,3; CZARNECKA and OGŁÓDEK, *Prawo energetyczne*, 485–86.

⁵² J. DUBIŃSKI, "Zadania własne gminy w zakresie planowania zaopatrzenia w energię elektryczną, ciepło i paliwa gazowe," *Samorząd Terytorialny* 7–8 (2012): 136; ZIEMSKI, *Energetyka a samorząd*, 18–19.

⁵³ The literature of the subject presents some doubts about the usefulness of the provision plan in the absence of the possibility of its verification using supervisory measures when it is inconsistent with the land development plan, in other words in the case of its incompatibility with the law or when no land development plan exists. See A. LIPIŃSKI, "Niektóre problemy nowego prawa energetycznego," *Przegląd Ustawodawstwa Gospodarczego* 5 (1998), LEX no. 14732/2.

⁵⁴ See WALASZEK-PYZIOŁ, *Energia i prawo*, 94.

pursuant to art. 20 para. 5 EL, which permits contracts to be made with such undertakings for the realisation of a Provision Plan. Consequently, the Plan cannot produce any legal effects. As a result, this instrument (just like Guidelines) cannot be classified as sovereign forms of administration (or local enactments, for that matter) imposing duties and rights on their recipients.⁵⁵

Furthermore, we need to accept that a Provision Plan should be comprehensive. It has to consider all three energy carriers (heat, electricity and gaseous fuels). This is directly due to art. 20 EL, which expressly caters for only one provision plan for heat, electricity and gaseous fuels.⁵⁶ Therefore, such a document cannot address only one energy carrier, while no more than one such plan can exist for a particular commune.

Another instrument designed to implement the municipal task under our discussion, as envisaged by art. 20 para. 5 EL, is represented by contracts concluded between a municipality and electricity undertakings. Art. 20 para. 6 EL provides that this non-sovereign form, which is proper for private law, is the main instrument implementing the task of energy provision and as such should guarantee its implementation. In contrast, sovereign forms of public law, represented by the Guidelines and the Provision Plan, are tools of choice if a contract is ineffective.⁵⁷

As in the case of the Guidelines and Provision Plans, the Energy Law does not specify the legal character of contracts, either. It is commonly assumed in the doctrine that civil-law contracts will be used here. It also tries to specify their content. Such a contract should specify the tasks of an undertaking, the manner in which the commune is going to participate in its operations, rules for financial settlements, as well as financial sanctions for non-performance or improper performance.⁵⁸

Lastly, art. 20 para. 6 EL is worth considering, which is a resolution adopted by the municipal council if the Provision Plan cannot be implemented on the basis of contracts made with entrepreneurs. Such a resolution is to indicate the section of the Provision Plan which operations in the territory of the commune must comply with. In this way it is determined which clauses of the Plan will be legally binding and that the Plan itself has no such character.⁵⁹ Although this provision in general deals with the measures taken by all entities operating in the area of the commune, it is obvious that it will primarily concern operations of electricity undertakings, because they play the most significant role in this context. However, the municipality is not

⁵⁵ ZIEMSKI, *Energetyka a samorząd*, 20–21; A. WALASZEK-PYZIOŁ, *Energia i prawo*, 95.

⁵⁶ M. SZYDŁO, "Planowanie w gospodarce energetycznej na obszarze gminy," *Samorząd Terytorialny* 5 (2004): 50.

⁵⁷ ZIEMSKI, *Energetyka a samorząd*, 33–34.

⁵⁸ CZARNECKA and OGŁÓDEK, *Prawo energetyczne*, 488.

⁵⁹ ZIEMSKI, *Energetyka a samorząd*, 30.

entitled to impose concrete duties on these entities, but it can outline their limits of operation in a negative way. So it is permissible to specify which operations can be pursued by undertakings within the scope of the implemented projects so that they will be consistent with the indicated part of the Provision Plan.⁶⁰ As argued in the literature, the legislator intended to impart on the said resolution the character of “municipal regulations” within the meaning of art. 40 EL although the law does not directly determine this.⁶¹

It can be noticed, that the task of providing heat, electricity and gaseous fuels is a process which involves many entities. The implementation of the task at hand, due to its complexity, involves the cooperation of entities based on public law, in other words municipal governments. They are in charge planning and organisational issues. Other entities involved in the realisation of provision tasks are private-law entities, that is electricity undertakings. An efficient and effective implementation of the task under our discussion hinges on the harmonious cooperation of both groups.

CONCLUSION

Provision of heat, electricity and gaseous fuels is an extremely important task, mainly from the perspective of an individual customer since it provides for one of his or her fundamental needs. The efficiency and reliability of this process are therefore of key importance, so the legislator provided for a close cooperation between entities authorised to carry out the task. This cooperation is expected to consist in agreeing on planning acts and concluding necessary contracts.

The task of providing energy carriers is entrusted to the commune (*gmina*, municipality), which is a public entity, but its responsibility is restricted typically to planning and organisation. Having been granted such competences, the municipal government’s role is to coordinate the operations of the commune with those of electricity undertakings. The role of the commune in discharging the duty to provide heat, electricity and gaseous fuels is restricted mainly to that of a coordinating body. While enabled to take other measures to carry out this task on its own and in its entirety, the commune is allowed to establish budgetary undertakings or commercial companies (utility companies), but in the majority of cases electricity undertakings will perform the largest number of tasks related to energy provision. This is so because the municipal government is not capable of delivering this task using its own assets at its all stages.

⁶⁰ WALASZEK-PYZIOL, *Energia i prawo*, 96–97.

⁶¹ LIPIŃSKI, *Niektóre problemy nowego prawa energetycznego*.

Such a division of tasks stems from the fact that electricity undertakings, as specialised institutions, are better suited technically, logistically or financially to provide various energy carriers. As a result of their deep commitment and high activity, such undertakings have been entrusted with public-law duties associated with the task of energy provision as entities designed to deliver public utility services. This solution is significant from the perspective of the State's regulation and supervision of undertakings whose operation is aimed at satisfying residential needs in terms of energy carriers, in other words operation which has far-reaching consequences.

Given the considerable role played by electricity undertakings in energy provision, we should endorse the view that they should be allowed to influence the municipal energy provision policy. The municipal government can strongly affect the investments planned by undertakings, yet reciprocity in this regard has not been regulated yet by statute.⁶² There is no question that the process of providing energy carriers cannot be delegated entirely to entities operating under private law. The significance of this task in the context of residential needs is considerable so the State cannot relinquish its control of it; likewise, decision-making cannot be transferred entirely to external entities in such an important domain. Nonetheless, we might consider an extension of the competences of electricity undertakings in the said process of investment planning.

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⁶² ZIEMSKI, *Energetyka a samorząd*, 40.

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THE PROVISION OF HEAT, ELECTRICITY AND GASEOUS FUELS AS A MUNICIPAL TASK

Summary

This article presents the task of municipal government involving the provision of heat, electricity and gaseous fuels for the local inhabitants. First of all, the notion of municipal task is outlined. Then, the task of municipal supply is analysed in some detail, its various interpretations in doctrine and attempts at qualifying it. Further, the article discusses the various legal instruments municipal government uses to accomplish the said task. In this part, our attention is drawn mainly to the role of municipal government in the supply process as well as that of electrical companies which support the municipality in this task.

Electricity undertakings perform significant tasks in this process, resolving technical issues in particular, while the role of the municipality is limited mostly to planning and organisation of energy supplies. It is important to distinguish between the tasks of local government and those of electricity undertakings.

Key words: energy law; local government; electricity undertakings.

Translated by Tomasz Pałkowski



The preparation of the English version of *Roczniki Nauk Prawnych (Annals of Juridical Sciences)* no. 4 and its publication in electronic databases was financed under contract no. 753/P–DUN/2017 from the resources of the Minister of Science and Higher Education for the popularization of science.