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Limitation of the Freedom of Contract and the Autonomy of the Will of a Party to a Framework Agreement and of a (Commodity) Exchange Transaction in the Energy and Fuel Gas Markets

Ograniczenie swobody umów i autonomii woli strony umowy ramowej oraz strony transakcji giełdowej na rynku energii i paliwa gazowego

ABSTRACT

This paper deals with the automation of trading in electricity and fuel gas and the obligation for electricity and fuel gas to be traded on an energy exchange ("exchange trading obligation"), which are provided for in energy regulations and capital market regulations (covering the stock exchange and trading in financial instruments). The automation of trading, as exemplified by framework agreements and specific contracts based thereon, has created the problem of determining the limits of the legal effects of an expression of intent. In contrast, selling via a commodity exchange requires a complex system of purchase and sale relationships based on commodity orders and multi-entity sale contracts entered into via a commodity exchange. In either case, the conclusion of a sale contract entails the problem of determining the limits of the autonomy of the will of (or the situation of) the seller in a civil-law contractual relationship in relation to the other party (or other parties) to the contract and in connection with public-law obligations under mandatory provisions of law and/or private-law (contractual) obligations of all or only some of the parties to the contract. The obligation to sell that arises from both administrative law and private law (a voluntarily accepted obligation) delimits the autonomy of the will of the seller, resulting in his freedom of contract being limited as regards his discretion to decide whether or not to enter into a contract, to choose who to contract with, and to

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decide on the terms of the contract. This paper analyses the foundations and performance of a specific contract entered into under a framework agreement and, in similar terms, the commodity exchange transaction, with limitations of the freedom of energy contracts as a backdrop.

Keywords: energy law; civil law; commercial law; energy contracts; energy market

INTRODUCTION

The autonomy of an individual to decide on his legal position in relation to equal-footed legal subjects is a fundamental principle of civil law (private law). This autonomy will, however, be limited if a valid public interest (Article 22 of the Polish Constitution[1]) comes into play. This public interest sets the limits of government intervention in the private-law territory of energy companies that sell electricity or fuel gas ("suppliers").[2] The guarantee of access for energy consumers to energy resources (electricity and/or fuel gas)[3] *de lege lata* is a component of the public obligation of the government to guarantee human rights, civil liberties and the security of citizens and, at the same time, to protect the rights and liberties of electricity and gas suppliers (as legal subjects on an equal footing with consumers) with their right to a fair profit.[4] A measure of fulfilment of this obligation is the capacity of the government to protect the wellbeing of citizens (their sense of security and economic living conditions). This public interest justifies the limitation of the freedom to conduct a business for energy companies to the extent of the freedom of contract (as regards the discretion to decide whether or not to enter into a contract, to choose who to contract with, and to decide on the rights and obligations of the parties). It also requires the seller to supply its services to the public, continuously

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 3.11.2025).

[2] See judgment of the Voivodeship Administrative Court in Warsaw of 12 September 2008, V SA/Wa 943/08, LEX no. 470086. See also R. Stankiewicz, *Podstawowe pojęcia teoretyczne w nauce prawa administracyjnego*, [in:] *Prawo administracyjne*, eds. J. Jagielski, M. Wierzbowski, Warszawa 2020, p. 104; J. Zimmermann, *Prawo administracyjne*, Warszawa 2014, p. 309; M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, p. 39. See judgment of the Polish Constitutional Tribunal of 12 March 2007, K 54/05, OTK-A 2007, no. 3, item 25; of the Polish Constitutional Tribunal of 31 March 2005, SK 26/02, OTK-A 2005, no. 3, item 29; judgment of the Voivodeship Administrative Court in Warsaw of 3 August 2004, V SA 75/03, Lex Polonica no. 370990.

[3] Cf. H. Izdebski, M. Kulesza, *Administracja publiczna. Zagadnienia ogólne*, Warszawa 2004, p. 126. Cf. P. Bogdanowicz, *Interes publiczny w prawie energetycznym Unii Europejskiej*, Warszawa 2012, pp. 71–79.

[4] Cf. Article 5 and Article 64 (1) of the Polish Constitution. Cf. R. Stankiewicz, *op. cit.*, p. 102.

and reliably.[5] Obviously, this requirement applies to contracts for the supply of fuel gas or electricity (the sale contract, the distribution service contract, and the comprehensive sale and distribution service contract).

The complexity of the regulatory framework for the fuel and energy market, the fact that suppliers have become highly specialised, the number of customers (several million), and the large-scale nature of contracts with suppliers have determined the adhesive nature and great complexity of such contracts. This has led to the situation where the freedom of contract is low and the function of contract which consists in creating rights and obligations is significantly impaired. This, combined with the risk that public needs will be marginalised by suppliers and that suppliers will focus on maximising their profits[6] *de lege lata* have caused Parliament to pass laws that protect the weaker party to such contracts, i.e. to protect the interests of customers, with the protection intended as a way to balance the interests of the parties to contracts for the supply of energy. Such contracts are subjected to *iuris cogentis* (or mandatory rules of law), which give little freedom to the parties to decide on the terms of their contracts (as regards the discretion to choose who to contract, to set the price, to decide on the terms of supply or delivery or the terms of payment) as compared to contracts regulated by the Civil Code.[7] Moreover, the law requires suppliers to enter into such contracts. The limitation of the autonomy of suppliers performs two complementary functions. Firstly, it is an instrument for the government to regulate a particular area of the economy and to fulfil its obligation to provide people with access to electricity and/or fuel gas (at affordable prices and of appropriate quality). Secondly, it is an instrument for eliminating the actual imbalance between the positions of the parties involved (i.e. the contracting parties).[8]

[5] See Articles 5, 5a, 7, and 8 of the Act of 10 April 1997 – Energy Law (consolidated text, Journal of Laws 2024, item 266, as amended), hereinafter: the Energy Law. See also judgment of the Constitutional Tribunal of 10 July 2007, K 37/04, OTK-A 2006, no. 7, item 79; Article 4 (1) of the Energy Law; Article 3 (3) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211/55, 14.8.2009); Article 3 (2) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211/94, 14.8.2009).

[6] See K. Zamasz, *Efektywność ekonomiczna przedsiębiorstwa energetycznego w warunkach wprowadzenia rynku mocy*, Warszawa 2017, pp. 9–13.

[7] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2024, item 1061, as amended).

[8] See P. Machnikowski, *Umowy*, [in:] *System Prawa Prywatnego*, vol. 5: *Prawo zobowiązań – część ogólna*, ed. K. Osajda, Warszawa 2020, p. 556. See also T. Zerres, *Bürgerliches Recht. Allgemeiner Teil, Schuldrecht, Sachenrecht, Zivilprozessrecht*, Berlin 2019, p. 64. Cf. C. Johannes, *Energieorientierte Losgrößen- und Reihenfolgeplanung bei zeitabhängigen Energiepreisen. Konzeption quantitativer Planungsmodelle zur Entscheidungsunterstützung*, Wiesbaden 2020, pp. 26–27.

The public limitations of the freedom of contract are accompanied by market pressure (arising from relationships governed by private law) and the fact that the contracting process has become faster and hassle-free: legal transactions of fuels and energy (formerly treated solely as a social good, has also become a commodity or product that can be offered on the market and become traded[9]) have become automated, which entails the problem of the limits of the legal effects of an expression of intent. The automation of contracts is increasing, and contracts are increasingly often structured as multi-entity arrangements. This paper therefore aims (i) to identify contracts in the market for fuels and energy which are or may become automated and take the form of multi-entity arrangements, (ii) to set these phenomena in the context of limitations of the general freedom of contract, and (iii) to analyse the process and consequences of entering into automated and/or multi-entity contracts.

The above objectives have determined the decision to focus on investigating the process and moment of limiting individual autonomy in civil-law B2B transactions, which usually take the form of framework agreements and specific contracts based thereon. This paper also looks at statutory limitations of the freedom of contract imposed on energy companies (starting with electricity producers and other electricity sellers and fuel gas suppliers, the latter being the first link in the supply chain), which were required by law to trade publicly in electricity and/or fuel gas (gas; referred to as "exchange trading obligation").[10] In this regard, the law imposed particular obligations on particular entities. The obligation to trade publicly in electricity was lifted on 6 December 2022,[11] but the obligation in respect of gas still applies. Currently, as the government is withdrawing its relief measures protecting customers against soaring electricity prices, re-introducing the public trading obligation for electricity is back on the agenda for discussion to increase market liquidity and to ensure that electricity is priced objectively. However, new market factors have emerged that should be taken into account and include an increase in renewable energy sources and the allocation of the electricity (from such sources) to end users, the proposal that a new market should be created for electricity from renewable sources, the use of conventional energy source primarily for the purpose of maintaining stable supplies, providing system services and participating in the capacity market, as well as the conclusion of multi-year contracts for the sale of electricity by energy producers.

The reason for such limitations was a valid public interest, although the limitations were not mandatory or absolute. The exceptions to the public trading obli-

[9] See G. Kinelski, *Marketing w przedsiębiorstwie energetycznym – wybrane aspekty z perspektywy rynku polskiego*, "Polityka Energetyczna" 2014, vol. 17(3), p. 309.

[10] Article 49a of the Energy Law, which was effective until 5 December 2022, and Article 49b of the Energy Law.

[11] Article 49a of the Energy Law was repealed by Article 1 (4) of the Act of 29 September 2022 amending the Energy Law and the Renewable Energy Sources Act (Journal of Laws 2022, item 2370).

gation (both compulsory and optional exceptions) applied to business transactions which are insignificant for the (gas and electricity) markets because they involve small volumes of particular products and, therefore, have little impact on market prices and a marginal effect on the relevant market or because the products in such transactions are supplied directly (i.e. outside the network operator's system). These exceptions were justified by the fact that they prevent the distortion of fair competition.[12] The changes to the subject-matter and scope of the exchange trading obligation, both those already made and those which can be expected, do not affect the value and importance of the problems under discussion. Public trading will continue as an important tool for concluding contracts for electricity and gas and for pricing these commodities objectively.

An analysis of limitations in bilateral or multi-party contractual arrangements involving business entities requires (i) a reference to the freedom of contract and individual autonomy and (ii) a juridic analysis of the concept of framework agreement to the extent that it is useful within the context of energy contracts. As regards the problem of public trading, it is necessary to investigate commodity exchange membership and the exchange transaction process (which usually involves multiple entities). The focus of this paper is to identify the possibility of preserving individual autonomy and the ability to conduct a business within the limits of contractual arrangements or the limits of the administrative framework of the statutory obligation to enter into contracts. This paper focuses on one part of a competition market (and on framework agreements, exchange transactions and the regulated market) also because the nature of economic freedom is such that market participation should generally be voluntary with respect for the autonomy of the parties to a contract to decide on the terms of the contract.

IDENTIFICATION OF ENERGY CONTRACTS WHICH ARE OR MAY BECOME AUTOMATED OR ENTERED INTO AS MULTI-ENTITY CONTRACTUAL ARRANGEMENTS

If energy contracts are to be classified according to the supplier's access to a market (customers) and the typical socioeconomic objective in relation to an entity that obtains non-financial benefits (such as the ability to expand its operations effectively as a supplier or the statutory obligation for system operators[13] to maintain the capacity of equipment, systems and networks to supply electricity and/or fuel gas in a continuous and reliable process and in accordance with the applica-

[12] See Article 49a (5) to (6) of the Energy Law, which was effective until 5 December 2022, and Article 49b (2) of the Energy Law.

[13] See, e.g., Article 4 (1) of the Energy Law.

ble quality standards), four categories of contracts can be identified: (1) contracts that give a supplier access to a high-level market (transmission and distribution infrastructure, a natural monopoly) to be able to sell electricity or gas or to supply services in a low-level market (a competition market); (2) contracts for the sale of electricity or gas (directly or through sale arrangements) to customers, including end-users (in any type of transaction); (3) contracts that precisely define the terms of sale of electricity or gas; and (4) contracts designed to maintain the proper operation of the network system, its reliability and quality parameters, including the supply of utilities via the system.[14]

The first category includes contracts for connection to the network of a distribution or transmission system operator or a storage system operator and contracts for the service of transporting (transmitting or distributing) fuel gas or electricity (such contracts are also referred to as "access contracts"), and these contracts are neither automated nor multi-entity contractual arrangements. The transmission, distribution or storage system operator is one of the parties to the contract[15] and usually a natural monopolist. The contract is highly formalised, must be made in writing, and must contain particular provisions required by law, including provisions relating to its implementation.[16]

The same is true for contracts that fall into the fourth category, namely contracts for the supply of what is known as "system services", the supply of which is an obligation of system operators under mandatory provisions of law.[17] These services provide the conditions for the supply market to function, as they serve to maintain the capacity of the network system to deliver the services contracted for, to maintain the security of supplies and, in particular, to ensure the quality of the supplied energy, the continuity and reliability of supplies, and to avoid risks to human safety or the risk of economic losses.

A similar function is performed by contracts in the third category, namely the contract for the supply of commercial operator services (known as the "commercial balancing contract") or the contract for the supply of commercial and technical operator services (known as the "contract for commercial balancing and technical services in a balancing market"), the contract for the supply of commercial balanc-

[14] The study presents a developed concept of division of energy contracts, proposed by the author. See M. Marszałek, *Swoboda działalności gospodarczej wytwórcy – sprzedawcy energii elektrycznej*, Warszawa 2015, pp. 165–166.

[15] See Article 3 (24), (25), (26), and (28) of the Energy Law.

[16] See Article 5 (1) to (5) of the Energy Law and Article 7 (1) to (2a) of the Energy Law.

[17] See Article 9c (1) (8), Article 9c (2) (8), and Article 9j (1) of the Energy Law. Cf. § 2 (43) of the Regulation of the Minister of Economy of 22 March 2023 on detailed conditions for the functioning of the power system (Journal of Laws 2023, item 819; § 2 (3) of the Regulation of the Minister of Economy of 2 July 2010 on detailed conditions for the functioning of the gas system (consolidated text, Journal of Laws 2018, item 1158, as amended).

ing services and the contract for access to measurement data. These contracts are accessory to sale contracts and to contracts for the transport of electricity or gas, and they are necessary for these two types of contracts to be performed properly.

The contracts in the third and fourth categories (known as "additional contracts") are supplementary to contracts for the supply of electricity or gas from the producer (or seller) to the customer. Normally, the customer is not one of the parties to such an additional contract, nor is he aware of the existence of any such contract. Such contracts are invisible to the customer.

Automation and a multi-entity structure are the features of the contracts that fall into the second category, namely contracts for the sale of electricity and gas to customers, as they allow for unlimited competition between suppliers and for customer acquisition. The contracts in the second category include: (i) the sale contract; (ii) the framework agreement and specific contracts based thereon; (iii) the contract of sale via a commodity exchange, on a regulated market or via a trading platform; and (iv) the comprehensive sale and transmission or distribution service contract.

The liberalisation of the electricity and gas markets and increasing competition among sellers (suppliers) have created the economic framework for multi-entity sale transactions and their automation. In the context of B2B contractual relationships, contracts for the sale of electricity and gas can be further classified, according to the regulatory regime based on selling models developed in the practice of dealing, into three subtypes: "continuous sale" (electricity or gas is sold permanently under a fixed-term contract or an indefinite-term contract), sale under a specific contract made under a framework agreement, and sale via a commodity exchange, a regulated market or a trading platform. The first sale contract is the closest to the sale contract described in the Civil Code. It is a contract for the supply of a special product (electricity or gas) which the supplier must be ready at all times to deliver at a particular point of time, i.e. when the product reaches the customer's system and is used by the customer (and measured when used). The second subtype is based on the concept of "comprehensive contract", although it is not viewed consistently by legal academics, scholars and commentators. The main social function of this subtype is to organise the contracting process in the future. The third subtype followed from the obligation for electricity and fuel gas to be traded on an energy exchange (the "exchange trading obligation"). It is currently used for selling excess electricity or available quantities and for purchasing tranches (or blocks) of electricity depending on changes in the demand for electricity or where the demand is underestimate and requires a complex system of purchase and sale transactions made within the framework of a contract with a commodity exchange and based on commodity orders and sale contracts entered into via a commodity exchange for the sale or purchase of electricity or gas. The second and third subtypes are becoming increasingly important in commercial transactions, which makes it necessary to investigate further the performance and consequences of such contracts and to determine the direction for further regulation.

LIMITATION OF THE GENERAL FREEDOM OF CONTRACT

Although the freedom of contract[18] is presented differently by different legal academics, scholars and commentators, the following elements (manifestations, types, meanings and scope) of the freedom of contract in terms of substantive law, which are also elements of the autonomy of will, can be distinguished: (i) the freedom to decide on what terms to contract, including the purpose of the contract; (ii) the freedom to enter into a contract, which includes the discretion to decide whether to contract or not, who to contract with, to amend a contract or to end a contract.[19]

The scope of the freedom of contract understood as it is described above excludes the discretion to choose the form of the contract, as the form of contract does not affect the freedom of the parties – their freedom is not actually restricted by the form.[20] It may, however, affect the exercise of the freedom, as the parties may have to experience some inconvenience or incur some costs as a result. Therefore, in the contracts to be analysed below, the form is seen as a consequence (or an element) of the freedom to decide who to contract with. For the same reason, that freedom also covers the discretion to choose the best possible contracting procedure which allows the parties to achieve the economic objective of the contract.

A normative manifestation of how an individual's right of access to energy resources is satisfied effectively is the statutory obligation for energy or gas suppliers to enter into contracts with customers. Article 8 of the Energy Law[21] provides for the right to require an energy supplier to enter into a contract for the sale (supply) of gas or electricity to a customer or to continue to perform such a contract (if the supplier unreasonably suspends its performance of refuses to perform). This right is linked with the statutory obligation for the supplier to enter into a contract with a customer and to perform (or to continue to perform) the contract (i.e. to take advantage of its general freedom of contract), which obligation is a manifestation of how the freedom of contract is restricted. The contracting obligation performs two complementary functions. Firstly, it is an instrument for the government to regulate a particular area of the economy and to fulfil its obligation to provide people with access to electricity and/or fuel gas. Secondly, it is an instrument for eliminating the

[18] Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, Warszawa 2020, p. 133. Cf. A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warszawa 1998, p. 91.

[19] See Z. Radwański, A. Olejniczak, *op. cit.*, p. 133; Z. Radwański, *Zagadnienia ogólne czynności prawnych*, [in:] *System Prawa Prywatnego*, vol. 2: *Prawo cywilne – część ogólna*, ed. Z. Radwański, Warszawa 2008, pp. 10–11. See also R. Trzaskowski, *Granice swobody kształtowania treści i celu umów obligacyjnych: art. 353[1] k.c.*, Kraków 2005, p. 35; A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, [in:] *Zobowiązania. Zarys wykładu*, ed. W. Czachórski, Warszawa 2009, pp. 145–146; A. Stelmachowski, *op. cit.*, p. 92.

[20] See P. Machnikowski, *op. cit.*, p. 543. See also Z. Radwański, *Zagadnienia ogólne…*, pp. 11–13.

[21] See also Article 5a of the Energy Law.

actual imbalance between the positions of the parties involved (i.e. the contracting parties).[22] The party that exercises the right granted in Article 8 of the Energy Law not only limits the freedom of the other party to enter into a contract and to decide with whom to contract, but it also limits the other party's freedom to decide on what terms to enter into the contract.

Within the context of the subject matter of this paper, the following two points should be made about the provision of Article 8 of the Energy Law. Firstly, Article 8 of the Energy Law applies to bilateral contracts only and the legal situation in which (generally) only the purchaser (customer) is a group of entities (a consortium or a group purchasing organisation) interested in negotiating more favourable commercial terms with the supplier (which usually include the price or payment deadlines), and such a group or organisation is usually represented by an authorised agent. The other party to the contract is never a multi-entity structure; it is a single seller (a supplier). This may create a contractual relationship – based on a sale contract, a framework agreement and specific contracts based thereon, or a comprehensive fuel gas or electricity sale and transport contract) – which is a multi-entity structure on the side of the purchaser.

Secondly, the right under Article 8 of the Energy Law could hardly be exercised through real-time transactions via a commodity exchange (day-ahead trading) by, e.g., requiring that the terms of the contract be actually decided by the President of the Energy Regulatory Office or a court of law. Administrative procedures take time, while the public trading market is based on contractual relationships with a commodity exchange, the availability of an adequate "mirror-image" offer and the execution of a transaction on a trading day. Therefore, the problem is not the conclusion of a contract, but its actual performance.

FRAMEWORK AGREEMENTS AS A MANIFESTATION OF AUTOMATED CONTRACTING IN BILATERAL OR MULTI-PARTY B2B CONTRACTUAL RELATIONSHIPS

One instrument for automated contracting and performance of contracts for the sale of electricity or fuel gas is the framework agreement (or the master agreement) with specific contracts based thereon.[23] The economic purpose of a framework sale agreement is to make the selling process quick and simple. This is done by providing for all the essential terms of a specific contract, except for any variable elements, which are usually the parameters of the product (e.g. the quantity or other technical

[22] See P. Machnikowski, *op. cit.*, pp. 549–550.

[23] Cf. J. Fried, *Rechtliche Bewältigung des OTC-Handels*, [in:] *Handbuch Energiehandel*, eds. H.P. Schwintowski, F. Scholz, A. Schuler, Berlin 2018, pp. 110–111.

parameters of the electricity or gas contracted for, with a breakdown into contract periods, such as a particular hour of a 24-hour period [or a quarter of an hour, which will presumably be the case soon]), the term of the specific contract (i.e. the period over which the product is to be supplied) and, obviously, the price. These terms are normally negotiated between the parties and, if the parties enter into a framework agreement, they do so – reflecting the nature of the freedom of contract – voluntarily (an exception is explained below). A framework agreement may be entered into between a supplier and its customer (a purchaser) or between a supplier and a transmission system operator (e.g., a power transmission system operator), in which case the agreement is based on what is known as a balancing offer.[24]

A framework agreement may require the parties to make efforts to cooperate with the aim of entering into specific contracts thereunder, and this requirement is the obligation of the parties to act diligently.[25] This problem takes a different shape in a framework agreement between a supplier (a producer of electricity or the original supplier of gas, e.g. a pipeline operator or a storage system operator) and a transmission system operator. The socioeconomic objective of a framework agreement between such entities is to ensure that the operators are able to carry out their statutory tasks, and the contracting obligation is based on network operators' instructions, which are binding upon energy companies (and which are an integral part of the contract). This is linked with the legal obligation to make balancing offers (for what is known as "system services") covering the available or reserved volumes of electricity and power or gas, and the possibility to provide for liability in this regard, which is specific to an obligation to deliver particular results. This legal obligation is accompanied by the transmission system operator's discretion to accept such an offer and to cause a sale contract to be entered into effectively.

Formally, the provisions of a framework agreement are incorporated into the same document together with a transmission service contract between an electricity producer or a gas supplier and a system operator. In the case of such legal relationships under a framework agreement and in terms of the socioeconomic objective related to the public tasks of system operators, the view presented by G. Domański and A. Olejniczak is adequate: the two authors argue that in addition to its normative provisions, an essential element of a framework agreement is the obligation of the

[24] Cf. § 2 (21) and (25), § 2 (4), § 23 (1) (3), and § 24 (3) (2) of the Regulation of the Minister of Economy of 22 March 2023.

[25] See M. Krajewski, *Zobowiązania powstające podczas zawierania umów*, [in:] *System Prawa Prywatnego…*, vol. 5, p. 1005. The author accurately defines a framework agreement to be a contract that sets out provisions under which specific contracts are to be entered into. Such provisions include the procedure for entering into, and the form of such contracts. A framework agreement also specifies at least some elements of such contracts (e.g., a general description of what is to be supplied, the general terms of the contracts, certain rights and obligations of the parties to the contracts). A framework agreement understood so narrowly is referred to as a "normative contract".

parties to the agreement to enter into specific contracts.[26] This obligation will only be enforceable if the framework agreement contains objective criteria for crystallising its provisions and which allow them to be crystallised by the other party or by a third party (such as a court of law).[27] The obligation to make offers does not usually exist in other arrangements of parties to the framework agreement, and the parties to the framework agreement agree upon additional provisions for how specific contracts under the framework agreement should be entered into.

Whether or not a specific contract under a framework agreement will be entered into depends on whether the parties have agreed upon specific terms of the transaction, i.e. the quantity of the electricity or gas requested by the customer (with a breakdown of the quantity), the term of the specific contract and the price, which may be different for different periods of time.[28]

The lack of a detailed regulation separate from the provisions of the Civil Code has led to the emergence of two representative approaches in commercial practice. One involves conducting non-binding negotiations,[29] which are subsequently given a formal shape through a "transaction agreement" (which is an offer within the meaning of Article 66 § 1 and Article 66 § 2 of the Civil Code and with the implications of the provisions of these two sections). This "transaction agreement", containing specific terms of the transaction, is delivered to the other party. When the document is received by the other party, that party immediately accepts the offer, which creates a sale contract between them. The fact that the contract must be made in writing is strong evidence of the existence of the contract. As a result, the contract can be reported to the system operator so that the electricity or gas contracted for can be supplied. The contract may also be entered into through electronic acceptance of an offer made electronically, without a qualified electronic signature required for the validity of the contract.[30] The validity and effectiveness of the contract are reviewed before it is performed. The basis for the review is the submission of the contract by both parties to the system operator.

The other approach is reflected by the tendency to make the contract conclusion process automatic. The process involves sending a "transaction agreement" (an offer) to its recipient. This document is normally issued following non-binding negotiations between the parties. No response from the recipient of the offer is deemed as the recipient's acceptance of the terms, or – in fact – provisions of the

[26] See G. Domański, *Umowa ramowa (na tle prawa niektórych państw EWG i Polski)*, Warszawa 1989, pp. 79–80; A. Olejniczak, *O koncepcji umów ramowych*, "Państwo i Prawo" 1990, no. 4, pp. 76–77. Cf. A. Stelmachowski, *op. cit.*, p. 242.

[27] See S. Włodyka, M. Stec, *Powiązania umów handlowych*, [in:] *Prawo umów handlowych*, ed. M. Stec, vol. 5A, Warszawa 2020, pp. 34–35.

[28] Cf. J. Fried, *op. cit.*, p. 112.

[29] Cf. Article 72 of the Civil Code.

[30] See Article 61 § 2 of the Civil Code.

specific contract.[31] In this case, too, the submission of the contract to the system operator by both parties serves as evidence of the fact that the contract has actually been entered into.

The main economic objective of a framework agreement, which corresponds to the unquestionable achievement of the competition markets for electricity and gas (the low-level market), is to enable the customer to choose a supplier of electricity or gas in relatively short periods of time and for successive periods of time and with different sellers.[32] The customer may enter into a specific contract with the seller that offers the best terms of supply (e.g. the price, the deadline for payment, or other additional services) to the customer for a particular period of time.

AN INSTITUTIONALISED METHOD OF ENTERING INTO CONTRACTS ON A PUBLIC TRADING BASIS

The obligation for electricity and (high-methane) fuel gas to be traded publicly, i.e. on a commodity exchange, a regulated market or a trading platform that deals in electricity or gas,[33] was a measure of limiting the freedom to conduct a business and the supplier's freedom to compete with other energy companies. The freedom to conduct a business was limited by delimiting the capacity to participate in a particular market or in a segment of a particular market or to decide on the extent of such participation.

Institutionally, the public methods of trading in electricity and gas should be seen as a separate legal framework for regulating how commercial transactions are made and settled when such methods are used. A commodity exchange is a group of people, equipment and technical measures that provide all market participants with the same trading conditions and the same access to market information at the same time, particularly information such as exchange rates and prices of exchange-traded commodities, as well as trading volumes.[34] A regulated market has

[31] See Article 68^2 of the Civil Code.

[32] Cf. Recital 20 of Directive 2009/72/EC in conjunction with Recital 99 and Article 72 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ L 158/125, 14.6.2019), and Recital 17 of Directive 2009/73/EC in conjunction with Recital 165 and Article 95 of Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (OJ L 2024/1788, 15.7.2024).

[33] See Article 49a of the Energy Law, which was effective until 5 December 2022, and Article 49b of the Energy Law.

[34] Article 2 (1) of the Act of 26 October 2000 on commodity exchange (consolidated text, Journal of Laws 2024, item 910, as amended), hereinafter: the Commodity Exchange Act.

similar features.[35] A (public limited) company that operates a commodity exchange, or a regulated market, aims to bring together those who want to sell and those who want to buy exchange-traded commodities or financial instruments, to ensure that transactions are made and settled securely and efficiently, to disseminate unambiguous information that can be used to assess the value of the commodities and to match buyers and sellers multilaterally in an non-discretionary manner.[36] What makes trading platforms different is that they are discretionary in the matching of buyers and sellers.[37]

An exchange market is an organised and formalised section of the market where the parties to commercial transactions influence one another and where those who want to sell a marketable commodity that is traded meet those who want to buy that commodity with the aim of fixing the sale price or the purchase price. An exchange market is where all the parties are offered the same terms of purchase and sale, equal access to market information, and the guarantee that their transactions will be made and settled securely and efficiently.[38]

Sale transactions are made under an agreement with a commodity exchange, contracts made via the exchange or the operator of a regulated market (which, in practice, is a commodity exchange), and orders to sell or to buy electricity or gas placed by transaction parties and/or on a regulated market.

The most common place where offers to sell electricity (or fuel gas as an exchange-traded commodity) are matched to offers to buy electricity (or fuel gas) within the framework of the statutory obligation for such commodities to be traded publicly on a commodity exchange or a regulated market is Towarowa Giełda Energii SA in Warsaw (TGE). It has been in operation since 2003 with the permission of the Polish Securities and Exchange Commission (currently the Polish Financial Supervision Authority). The role of TGE is to organise commodity trading (the traded commodities include electricity and fuel gas), to create conditions for TGE members to enter into (exchange) transactions (subject to the terms and under the circumstances described in TGE' internal rules and regulations, whether within

[35] Article 14 (1) and Article 14 (2) of the Act of 29 July 2005 on trading in financial instruments (consolidated text, Journal of Laws 2024, item 722, as amended), hereinafter: the Act on Trading in Financial Instruments. See also Article 2 (2b), Article 19, and Article 20 of the Commodity Exchange Act.

[36] Article 4 of the Commodity Exchange Act; Articles 14 and 18 of the Act on Trading in Financial Instruments.

[37] Article 78c (1) and Article 78f of the Act on Trading in Financial Instruments.

[38] See S. Jakubowski, *Giełda i jej rola w gospodarce*, [in:] *Regulowana gospodarka rynkowa. Wybór materiałów do studiowania polityki gospodarczej*, ed. U. Kalina-Prasznic, Kraków 2007, pp. 184–185; W.J. Katner, *Sprzedaż*, [in:] *System Prawa Prywatnego*, vol. 7: *Prawo zobowiązań – część szczegółowa*, ed. J. Rajski, Warszawa 2018, pp. 78–80. See also D.M. Moczko, *Mitteilungspflichten der Teilnehmer des Energiegroßhandelsmarktes nach dem europäischen Recht*, Frankfurt am Main 2020, pp. 85–87.

or outside the exchange) and ensure that such transactions are made and settled securely and efficiently (transaction settlement processes can be subcontracted).[39]

A transaction made via a commodity exchange or a regulated market is settled, as a rule, by a commodity broker or brokerage house that is a member of the exchange or by a commodity broker or brokerage house that is a member of an exchange clearing house. The broker is bound by a contract with its client (which has the right to transact) and is responsible for ensuring that its client fulfils all its obligations resulting from its exchange transactions and/or cross-border transactions. A party to a transaction will only be permitted to settle its transactions independently if it is licensed by the Polish Financial Supervision Authority to hold accounts or to keep registers of particular exchange-traded commodities covered by its transactions.[40] Transactions can also be made by legal persons as customers eligible to change the seller (supplier) under the provisions of the Energy Law. As a general rule, membership of the commodity exchange is open to professional commercial entities only.[41] The basic unit of any instrument (traded on the exchange) is 1 MWh of electricity specified with the accuracy of 0.1 MWh. A partial transaction may be made for at least 0.1 MWh, and the minimum unit of supply (period of performance understood as the period of physical delivery) is 1 (one) hour (and, in respect of electricity, the minimum unit and period of delivery may also be equal to a full quarter of an hour[42]) on the supply date.[43] In contrast, in the market for fuel gas, the basic unit of a traded instrument is a quantity of gas (MWh) determined as the product of 1 MW multiplied by the number of hours over the performance period, over a particular hour on the supply date or over a particular supply period.[44]

[39] Article 10 (1) of the Commodity Trading Rules of TGE.

[40] Article 50 (1) and Article 50 (2) of the Commodity Exchange Act.

[41] Article 9 (3) of the Commodity Exchange Act.

[42] Cf. R. Gersdorf, D. Wragge, *Energiebörsen als Innovationstreiber – die Zukunft des Energiehandels im Spannungsfeld zwischen Digitalisierung und Regulierung*, [in:] *Realisierung Utility 4.0*, vol. 1: *Praxis der digitalen Energiewirtschaft von den Grundlagen bis zur Verteilung im Smart Grid*, ed. O.D. Doleski, Wiesbaden 2020, p. 497.

[43] Articles 34 and 38 of the Detailed Terms of Trading and Settlement for Electricity on the Intraday Market; Articles 38, 43 and 47 of the Detailed Terms of Trading and Settlement for Electricity on the Day-Ahead Market; Article 25 of the Detailed Terms of Trading and Settlement for Gas on the Day-Ahead and Intraday Markets.

[44] Article 25 of the Detailed Terms of Trading and Settlement for Gas on the Day-Ahead and Intraday Markets.

THE PROCESS OF MAKING TRANSACTIONS THAT INVOLVE PUBLIC TRADING IN ELECTRICITY OR GAS

A *sine qua non* of a supplier's participation in transactions made via the exchange is the supplier's membership of the exchange. This is granted by a membership agreement with TGE.[45] This membership status is granted when the supplier has made the statement that it is familiar with and will comply with the Commodity Trading Rules of TGE (TGE Rules) and other rules and regulations of the exchange and has been admitted, by the exchange's governing body and in accordance with the TGE Rules, to trading, i.e. it is permitted to enter into contracts for electricity and/or gas with other members of the exchange at such time and in such a manner as may be specified for such contracts.[46]

By accepting membership of the exchange, the supplier agrees to comply (prospectively) with the contracting requirements, i.e. the rules under which transactions are made on the basis of orders. Such terms, or rules, cover, in particular, the technical parameters of standardised exchange commodities,[47] namely electricity or fuel gas, i.e. standardised traded units (in MWh), the minimum supply period (at least 1 hour on the supply date, and, in respect of electricity, also a full quarter of an hour), the procedure for matching sale orders to purchase orders (including on the basis of the terms of supply, the validity period of an validly placed order or the price) and the pricing procedure (the transaction price in the quotation system: the standard price, continuous quotations, prices in OTC transactions or the transaction price in an auction system).[48] Therefore, a member's acceptance of TGE's rules and regulations should be interpreted as the member's expression of intent to give legal significance to the member's normatively established actions which are externally presented (via an electronic exchange trading platform),[49] with effect for the member itself, other members of the exchange and the company operating the exchange. Accordingly, when interpreting the member's expression of intent, the exchange's rules and regulations should be seen as "established practices" (see Article 65 § 1 of the Civil Code).[50] As a general rule, membership of the commodity exchange is

[45] Subject to certain conditions. See Article 50b (1) of the Commodity Exchange Act.

[46] See Article 2 (3), Article 2 (5), and Article 11 (2) of the Commodity Exchange Act and the TGE Rules.

[47] Cf. B. Müller, *Entflechtung und Deregulierung. Ein methodischer Vergleich*, Berlin 2004, p. 169.

[48] See Articles 46–48 of the Detailed Terms of Trading and Settlement for Electricity on the Day-Ahead Market.

[49] According to the expression theory, which places emphasis on the protection of trust and the security of legal transactions, cf. Z. Radwański, *Wykładnia oświadczeń woli*, [in:] *System Prawa Prywatnego…*, vol. 2, pp. 52–62.

[50] *Ibidem*, pp. 69–70, 73.

open to professional commercial entities only.[51] It follows that the meaning and significance of a member's expression of intent should, when interpreted by reference to the specialised language used in such rules and regulations and to the situational context, be clear and easy-to-follow for any exchange market participant. As the practices of market participants and exchange trading are standardised, it is legally impossible for members of the exchange to negotiate the terms of contracts, which are subject to the exchange's rules and regulations. In the best-case scenario, it is possible to place an order (as a mirror image) that meets an exchange member's individual requirements, subject to the rules established by the exchange.

TGE's rules and regulations provide the legal framework for transaction participants. They use the framework to make orders to sell or to buy electricity or gas and to agree on the terms of their sale contracts in each case (such terms include the quantity of the commodity, the delivery date and the price). However, the sale contracts are not entered into between the TGE members whose orders to sell and orders to buy have been matched. The party to the contract with a TGE member is TGE itself, which acts as the seller or the buyer, as the case may be, and it is TGE that is responsible for settling the transaction between its participants.[52] TGE, however, is not responsible for physical delivery or receipt of the quantity of electricity or gas that is contracted for, nor is it liable for any loss or damage resulting from failure to deliver or defective delivery of the commodity or failure to receive the same. Similarly, TGE is not responsible for ensuring the capacity of the system operator's network required for such delivery.[53] It is the transaction participants who are so responsible and liable to each other, despite the fact that when an instrument is traded, the system operator's network capacity is reserved.

An order to sell or an order to buy that is placed by a TGE member[54] is deemed as a valid (and legally binding) contract within the meaning of Article 66 § 1 of the Civil Code. This requires some explanation. Legally speaking, such an order is the TGE member's obligation to supply a specified quantity of electricity or gas (an underlying instrument) to the power or gas network system, or to collect a specified quantity of the instrument from the system, on a specified future date and at a price that is stated in advance as a fixed amount or a price within a specified range.[55]

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[51] Article 9 (3) of the Commodity Exchange Act.

[52] Cf. P.A. Härle, *Rechtliche Bewältigung des Handels an der EEX*, [in:] *Handbuch Energiehandel*, eds. H.P. Schwintowski, F. Scholz, A. Schuler, Berlin 2018, p. 379.

[53] See Article 10 (2), Article 10 (4), and Article 11 of the TGE Rules.

[54] Under Article 2 (33) of the TGE Rules. See also Article 43 (10) of the TGE Rules.

[55] Cf. M. Romanowski, *Umowy dotyczące instrumentów pochodnych od papierów wartościowych*, [in:] *System Prawa Prywatnego*, vol. 9: *Prawo zobowiązań – umowy nienazwane*, ed. W.J. Katner, Warszawa 2018, pp. 707–709. A reconstructed offer made by an exchange transaction participant requires a reference to the individual markets operated by TGE, namely (i) the Intraday Market, with physical delivery of the electricity that is contracted for, (ii) the Day-Ahead Market, with physical delivery of the

It does not matter that the offer is made to a wide audience, although it is a specified audience: TGE members. The fact that some elements of the offer are not definite or that not all the essential terms of a contract to be based on the offer are not definite does not prejudice the legal value of the expression of intent made by the TGE member. There are no arguments against the possibility for the other party of the contract to add the necessary terms to the contract on the basis of its rules and regulations; in this case, the other party is the company operating the exchange, namely TGE. However, the contract will only be legally binding if the TGE member's expression of intent (to enter into the contract) is made complete on clear and transparent grounds accepted by traders (subject to the provision of Article 65 § 1 of the Civil Code),[56] i.e. in accordance with the TGE Rules. The contract is entered into when the terms of a member's offer to sell are matched to the terms of an offer to buy (broken down by MWh units and time units, as stated in the order), based on the orders placed (and confirmed by the exchange as correct), when the price of electricity or gas (the sale price) is determined or, in the case of OTC transactions, when the identity of the offers (the offer to sell and the offer to buy) is established in terms of, in particular, the price and the number of electricity or gas units, on a mirror image basis.[57]

The sale of electricity or gas by a supplier via the TGE commodity exchange can also be made at auction, which is provided for in Article 70^1 and subsequent sections of the Civil Code,[58] as well as in the TGE Rules.[59] What should be noted at this point is only that the offerer must specify (in an application for an auction) a proposed date of the auction, the number of electricity or gas units (the auction volume) and the offered price limit (the minimum sale price). An exchange transaction (and the related contract) on an auction basis is entered into when the offers made by the offeror and an auctioneer are matched or, more specifically, when the transaction price is fixed at the auction.

In each of the cases where an exchange transaction is entered into, the other essential terms of a contract between TGE and the transaction participants are agreed automatically on the basis of information provided by the parties when they were granted membership of the exchange and in accordance with other TGE rules and regulations. The statutory obligation for electricity and fuel gas to be

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electricity that is contracted for, (iii) the Commodity Futures Market, with delivery of the same quantity of electricity over each hour of the contractual supply period (e.g., a weekly supply contract, a monthly supply contract, a quarterly supply contract or an annual supply contract). See Terms of Trading for Instruments Traded on a Commodity Forward Market with Physical Delivery of Electricity.

[56] Cf. Z. Radwański, *Zawarcie umowy*, [in:] *System Prawa Prywatnego…*, vol. 2, pp. 325–326, 335.

[57] Cf. P. Steinwärder, *Der Smart Market als Aufgabe der Ordnungspolitik*, [in:] *Smart Market. Vom Smart Grid zum intelligenten Energiemarkt*, eds. C. Aichele, O.D. Doleski, Wiesbaden 2014, pp. 153–154; P.A. Härle, *op. cit.*, pp. 382–383.

[58] Cf. Z. Radwański, *Zawarcie umowy…*, pp. 365–365.

[59] See Articles 45–50 of the TGE Rules.

traded on an energy exchange ("exchange trading obligation") limits the supplier's freedom to enter into a contract for a statutorily specified volume of electricity or gas (in each calendar year), and TGE's rules and regulations delimit the freedom to decide on the terms of the contract. Regarding the freedom to decide who to contract with, it cannot be ruled that two entities will, before a transaction, enter into negotiations over the terms of the transaction, with one of the entities being statutorily required to sell electricity via a commodity exchange. It is not, however, entirely certain that the exchange transaction negotiated by the two entities will actually be entered into or, if it is entered into, whether its terms will be the same as those previously agreed.

CONCLUSIONS

If we consider the partial findings already presented, we will see that there is potential for the discussed automated trading models to be used in the sale of electricity or fuel gas to consumers and other non-business organisations (such as public institutions, local governments, public administration authorities). The contract risk is more likely to be commercialised and accepted more widely on the basis that contracts with suppliers of electricity or gas must contain provisions under which supplies by a reserve supplier are guaranteed in case a contract with the main supplier is not entered into or, if entered into, is not performed. The statutory requirement for a contract to provide for reserve supplies sufficiently protects the development of the potential for automated conclusion of contracts with the aforementioned category of customers. The examples to be followed, in terms of both law and practice, can be found in the sphere of professional, or B2B, transactions. The need for framework agreements to be adapted is dictated by the need to reflect, in the provisions of such contracts, measures to protect the interests of consumers, which is not necessary in B2B contracts. The limitations of the freedom of contract with regard to framework agreements do not pose a risk of excessive interference with the autonomy of the contract parties in any of the customer categories under analysis, and the contracting obligation (if any) is only contractual (i.e. it is not based on any mandatory law). This obligation is not a significant limiting factor and cannot be interpreted as mandatory in the case of consumers. The development of automated contracting, combined with growing competition among suppliers, has created a new market situation: the market potential for the conclusion of framework agreements with multiple suppliers and for the offering of deliveries over short periods of time is being freed. Energy brokers can come into play, offering advisory services and acting as intermediaries in the sale of electricity or gas to all customers, not only business entities, group purchasing organisations or medium-sized purchasers. Given the organisational costs involved

and the requirements ensuring that transactions are performed or compensation is paid, trading via a commodity exchange is practised mainly by large market players, professional entities or organisations that use the services of commodity brokers.

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ABSTRAKT

Obszarem podjętych rozważań są automatyzacja obrotu handlowego oraz publiczny obowiązek (tzw. obligo giełdowe) w zakresie sprzedaży energii elektrycznej i paliwa gazowego, unormowane w przepisach prawa energetycznego oraz z zakresu rynków kapitałowych (obejmujących giełdę i obrót instrumentami finansowymi). Ukształtowany przez praktykę handlową automatyzm, na przykładzie umów ramowych i wykonawczych, stwarza problem granic przypisania skutków prawnych oświadczenia woli. Z kolei sprzedaż za pośrednictwem giełdy towarowej wiąże się ze skomplikowanym układem stosunków kupna-sprzedaży, na podstawie skojarzonych transakcji giełdowych „zleceń" sprzedaży lub kupna i zawieranych za pośrednictwem giełdy wielopodmiotowych umów sprzedaży. Obie formy zawierania umów sprzedaży implikują zagadnienie ustalenia granic autonomii woli (czyli sytuacji) sprzedawcy w stosunkach cywilnoprawnych wobec drugiej strony lub innych stron stosunku zobowiązaniowego oraz w powiązaniu z publicznoprawnymi (normatywnymi, chodzi o *mandatory law*) lub prywatnoprawnymi (umownymi) obowiązkami każdej strony lub tylko niektórych stron tego stosunku. Administracyjnoprawny nakaz oraz prywatnoprawny (dobrowolnie przyjęty) obowiązek sprzedaży są źródłami delimitacji autonomii woli przedsiębiorcy, którego swoboda umów doznaje ograniczenia w zakresie decydowania o zawarciu umowy, wyboru kontrahenta oraz kształtowania treści umowy. Opracowanie zawiera analizę podstaw i przebiegu fazy wykonawczej realizacji umowy ramowej i tożsamo transakcji giełdowej, a tło stanowią generalne ograniczenia swobody umów energetycznych.

Słowa kluczowe: prawo energetyczne; prawo cywilne; prawo handlowe; umowy energetyczne; giełda energii