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Energy Cooperatives in the System of Polish Cooperative Law

Abstract

The regulation of the energy cooperative in Polish cooperative law is divided into different legal acts, which concern general issues on cooperatives, specific type of cooperative and activity on renewable energy production. The legal character of the energy cooperative is determined by this type of regulation and also by the subject of its activity as well as membership requirements. Study shows the variety of issues while concerning energy cooperative's legal character in the context of cooperative's characteristics.

Keywords: renewable energy, cooperatives, cooperative's activity, membership in the cooperative, Poland

1. Introduction

The energy cooperative is one of the newly introduced cooperatives types into the Polish cooperative law. In recent years, there has been a significant development of Polish cooperative law system in terms of introduction of special types of cooperatives, i.e. the European cooperative society, the social cooperative, the energy cooperative and the farmers' cooperative. As Polish cooperative law consists of one general law on cooperatives and a number of special laws on various types of cooperatives, which has recently increased, it is important for the interpretation of the provisions of Polish cooperative law system to make a dogmatic analysis of the applicable regulations. In this article such a dogmatic analysis is performed regarding the applicable regulation of energy cooperatives. The analysis is carried by introducing the applicable legislation to the energy cooperatives and by references to the characteristics of energy cooperatives.

2. The legal typology of energy cooperatives

The legal institution of the energy cooperative was introduced into Polish law in 2016 by article 2 point 33a of the May 20th 2015 Renewable Energy Sources Act¹, i.e. RESA (as amended by the Act of June 22nd 2016 amending the Renewable Energy Sources Act and certain other Acts²). It is a unique situation in terms of European regulations on renewable energy sources. Energy cooperatives exist in various countries of the European Union, e.g. in France, the Netherlands, Germany, Spain, Austria, Denmark,

¹ Official Journal of Laws 2020, item 261, consolidated text with further changes.

² Official Journal of Laws 2016, item 925.

and also in Great Britain. However, none of those countries have developed specific regulations governing the energy cooperative as a separate type of a cooperative³.

By definition formulated in Polish law, the energy cooperative is a cooperative within the meaning of the September 16th 1982 Cooperatives Act⁴ (CA) or the meaning of the October 4th 2018 Farmers' Cooperatives Act⁵ (FCA) — article 2 point 33a of the RESA. In Poland there is one general cooperative law (CA) and a number of laws that apply to specific types of cooperatives⁶. The 1st title of 1st part of the CA contains regulations of *lex generalis* character for all types of cooperatives. The regulation of *lex specialis* character on specific types of cooperatives is included in 2nd title of 1st part of the CA which governs workers' cooperatives and agricultural cooperatives. Also, the regulation of *lex specialis* character on specific types of cooperatives is included in a number of separate legal acts from CA. These separate acts are:

1. December 7th 2000 Act on the Functioning of Cooperative Banks, their Associations and Affiliating Banks⁷.
2. December 15th 2000 Housing Cooperatives Act⁸.
3. April 27th 2006 Social Cooperatives Act⁹.
4. July 22nd 2006 European Cooperative Society Act¹⁰, which is the implementation of the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees¹¹.
5. November 5th 2009 Credit Unions Act¹².
6. October 4th 2018 Farmers' Cooperatives Act.
7. February 20th 2015 Renewable Energy Sources Act, which contains regulation on energy cooperatives.

Energy cooperative can be regulated either by the CA or the FCA (Article 38o of the RESA)¹³. However, if the energy cooperative is regulated by the FCA it shall

³See: M. Karpiński, M. Szyrski, (in:) *Prawo energetyczne. Ustawa o odnawianych źródłach energii. Ustawa o rynku mocy. Ustawa o inwestycjach w zakresie elektrowni wiatrowych. Komentarz*, ed. M. Czarnecka, T. Oglódek, Warsaw 2020, p. 795; I. Heras-Saizarbitoria, L. Sáez, E. Allur, J. Morandeira, *The emergence of renewable energy cooperatives in Spain: A review*, Renewable and Sustainable Energy Reviews 2018, Vol. 94, pp. 1036–1043, <https://www.lexology.com/library/detail.aspx?g=c4d1ee58-16d7-443c-9ded-63067e78d9d3> [access: 27.12.2020].

⁴Official Journal of Laws 2020, item 275, consolidated text with further changes.

⁵Official Journal of Laws 2018, item 2073.

⁶It is not however a case in all of the EU member states. For example in Greece there is no general law on cooperatives, however, there are separate laws on rural cooperatives (L. 4384/2016), forest cooperatives (L. 4423/2016), urban/civil cooperatives (L. 1667/1986) which are active in any type of sector apart from agriculture, social cooperatives (art. 12 of L. 2716/1999), energy cooperatives (L. 4513/2018), social cooperative enterprises and workers' cooperatives which operate under law on social and solidarity economy (L. 4430/2016). See: A. Kornilakis, *Report from Greece: The New Law on Social Enterprises in Greece*, Company Law Journal 2017, Vol. 14, No. 5, pp. 206–208.

⁷Official Journal of Laws 2020, item 449, consolidated text with further changes.

⁸Official Journal of Laws 2020, item 1465, consolidated text with further changes.

⁹Official Journal of Laws 2020, item 2085, consolidated text with further changes.

¹⁰Official Journal of Laws 2018, item 2043, consolidated text with further changes.

¹¹Official Journal of the European Union, August 18th 2003, L. 207/25.

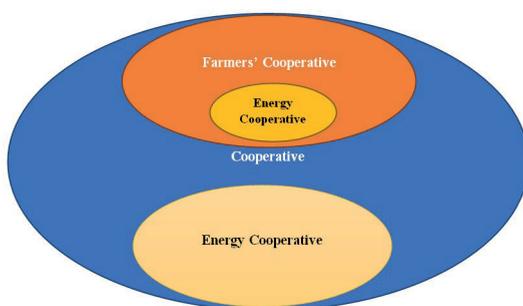
¹²Official Journal of Laws 2020, item 1643, consolidated text with further changes.

¹³The application of the CA or the FCA to the energy cooperative provides a possibility to found the second tier cooperative of energy cooperatives. In Polish cooperative law there are three types of second

be also subject to the CA regulation on the basis of the *lex specialis* (FCA) *derogat-legigenerali* (CA) rule of legal interpretation (art. 3 of the FCA). Therefore, in Polish law, there is a diversity of legal regulation on various types of energy cooperatives, and application of the specific regulation depends on the cooperative's founders will. In the other cases, then the energy cooperative case, application of a specific legal regulation on cooperatives depends on chosen economic activity that the founded cooperative shall perform¹⁴. This is not the case of energy cooperative's activity, as choice of the subject of economic activity appropriate for the cooperative within the meaning of CA or FCA allows at the same time to conduct activities appropriate for the energy cooperative. By definition, the energy cooperative may perform economic activity consisting in the production of electricity or biogas or heat in renewable energy source installations owned by an energy cooperative or its members and balancing the demand for electricity or biogas or heat, solely for own needs of the energy cooperative and its members, connected to an area-defined power distribution network with a rated voltage lower than 110 kV or a gas distribution network, or a heating network (article 2 point 33a of the RESA).

Therefore, the energy cooperative is a subtype of a cooperative within the meaning of the CA or a subtype of a farmers' cooperative (cooperative within the meaning of the FCA). The energy cooperative cannot be distinguished in the Aristotle's logical division (dichotomous division) as a separate category of cooperatives. Its characteristics are present in the cooperative *genus* (cooperative within the meaning of the CA) and also within the category of farmers' cooperative (cooperative within the meaning of the FCA). In the case of energy cooperative, one should consider to what extent its characteristics resemble one or different characteristics of the cooperative within the meaning of the CA or the cooperative within the meaning of the FCA (farmers' cooperative).

Typology of energy cooperatives is presented in the graph below.



tier cooperatives: cooperatives' revision associations (article 240 paragraph 1 of the CA), cooperatives' economic associations (article 243 paragraph 1 of the CA) and farmers' cooperatives associations (article 9 paragraph 1 of the FCA). The energy cooperative may found either of this second tier cooperatives, however the farmers' cooperatives association may be found only if the energy cooperative is the cooperative within the meaning of the FCA (article 2 point 33a and article 38o of the RESA).

¹⁴ Cooperative's economic activity should be indicated by its articles of association (article 5 paragraph 1 point 2 *ab initio* of the CA).

3. Characteristics of the energy cooperative

The characteristics of the energy cooperative are determined by subject of its activity and membership requirements. On the matter of its activity, the energy cooperative is regulated by the RESA with priority to the regulation included in the CA or FCA (article 38o of the RESA). The provisions of the RESA on the energy cooperative are of *lex specialis* character to the CA and FCA. Under the regulation of the RESA, energy cooperative is considered as the instrument supporting the production of electricity from renewable energy sources, agricultural biogas and heat in renewable energy installations¹⁵.

The energy cooperative should perform its activity exclusively for its own needs and its members (article 2 point 33a of the RESA). The provisions of the RESA enable the energy cooperative to distribute electricity, biogas or heat to other parties than cooperative members¹⁶. Neither is the energy cooperative entitled to sell electricity, biogas or heat, both to its members or other parties. The only recipients of electricity, biogas or heat distributed by the energy cooperative could be the cooperative itself and cooperative's members¹⁷. Such a situation corresponds with the provision of article 1 paragraph 1 of the CA. This article, which consists the legal definition of the cooperative in Polish law, states that the cooperative conducts joint economic activity in the interest of its members. Under the regulation of the RESA and the CA, it cannot be stated in the energy cooperative articles of association, that the cooperative shall conduct its activity in the interest of other persons than cooperative's members¹⁸. Such a provision

¹⁵ Other type of such an instrument is the energy cluster, which is a private law agreement between physical or legal persons, including universities, research institutes and local government units (Article 2 point 15a and Article 38a of the RESA). The energy cluster (private law agreement) concerns generation and demand balancing, distribution or trade of energy from renewable energy sources or from other sources or fuels within a distribution network with a rated voltage lower than 110 kV. The parties to the energy cluster may perform this activities within the area of a district (local government unit). Parties to the energy cluster shall be represented by the coordinator. The coordinator could be one of the energy cluster parties or the cooperative, association or a foundation formed to represent energy cluster parties.

¹⁶ Under the regulation of the RESA and the April 10th 1997 Act — Energy Law (Official Journal of Laws 2020, item 883, consolidated text with further changes), the distribution of energy produced by the energy cooperative should be understood as transportation of biogas or electricity by distribution network in order to deliver them to recipients or as distribution of heat to customers connected to the heating network (article 2 point 8 and 33a of the RESA and article 3 point 5 of the Energy Law). The distribution of energy is done by the distribution network operator. By law, the operator of the electricity distribution network has an obligation to conclude with the energy cooperative the contract on distribution (article 38d of the RESA and article 5 of the Energy Law). Moreover, also by law, the operator of the electricity distribution network has to conclude a contract with the energy company in order to make possible the settlements of the amount of electricity between the energy cooperative and the energy company (articles 38d and 40 paragraph 1a of the RESA).

¹⁷ See: T. Bąkowski, *Cooperatives as Entities Performing Public Tasks with Particular Emphasis on Social and Energy Cooperatives*, Prawo i Więż 2019, No. 3, p. 26.

¹⁸ Polish cooperative law does not allow the existence of cooperatives that perform activity not exclusively for their members. See: P. Zakrzewski, *Legalna definicja spółdzielni*, (in:) *Państwo — Konstytucja — Prawo. Księga pamiątkowa poświęcona Sędziemu Trybunału Konstytucyjnego Profesorowi Henrykowi Ciochowi*, Warszawa 2018, p. 544. This type of a cooperative, i.e. the social solidarity cooperative, exist in Portuguese law. See: D. Meira, *The Portuguese Social Solidarity Cooperative Versus the PECOL General Interest Cooperative*, International Journal of Cooperative Law 2019, No. 2, pp. 57–71. Cooperative of

of the cooperative's articles of association shall be null and void as contrary to the act (article 2 point 33a of the RESA and article 1 paragraph 1 of the CA in conjunction with the article 58 paragraph 1 of the Civil Code).

As mentioned, article 2 point 33a of the RESA states that the core economic of the energy cooperative (production of electricity or biogas or heat in renewable energy source installations and balancing the demand for electricity or biogas or heat) should be performed solely for own needs of the energy cooperative and its members. In the model of the energy cooperative economic activity, which should be considered as a model activity of a producer's cooperative, the producers and receivers of the energy from renewable energy sources are the cooperative's members¹⁹. On the other hand, the energy cooperative balance the demand for electricity or biogas or heat for its own needs and the needs of its members (article 2 point 33a of the RESA) and settles with the energy company the amount of electricity sent into the distribution network as compared to the amount of electricity taken from this network for its own consumption by the energy cooperative and its members (article 38c paragraph 3 of the RESA). The difference between balancing the demand and settling the amount of electricity by the energy cooperative concerns relations with its members (balancing the demand) and on the other hand relations with external parties, i.e. energy companies (settling the demand). Also, by law, settlements by the energy cooperative concern only the amount of electricity, but not the amount of biogas or heat (article 38c paragraph 3 of the RESA).

However, the legal definition of the energy cooperative states that it also produces the electricity or biogas or heat (article 2 point 33a of the RESA). Also, according to article 38f paragraph 1 of the RESA, the subject of the energy cooperative activity may be the production of electricity or heat or biogas in the renewable energy installations owned by the energy cooperative or its members. Moreover, there are also conditions to fulfill, if the energy cooperative produces electricity, heat or biogas (article 38e

this type, i.e. the co-operative society of collective interest (*la société coopérative d'intérêt collectif*), exist also in French law (art. 19-6 *Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération* [www.legifrance.gouv.fr; access: 27.12.2020]). The legal structure of this type of cooperative, namely the general interest cooperative, is also present in the Principles of European Cooperative Law (PECOL). This Principles do not have a legal character and were developed by the group of scholars as the model for cooperative legislation. Section 1.1. point 4 of these Principles provides the possibility of founding the cooperative with the aim of pursuing activities mainly in the general public interest. See: A. Fici, (in:) G. Fajardo, A. Fici, H. Henry, D. Hiez, D. Meira, H. Münkner, I. Snaithe, *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge-Antwerp-Portland 2017, pp. 19, 27–32.

¹⁹In the literature there is a distinction of cooperatives types on the basis of the nature of members' involvement in relationships between the cooperative and its members. These types are: consumer cooperatives, producer cooperatives and worker cooperatives. See: A. Fici, *An Introduction to Cooperative Law*, (in:) *International Handbook of Cooperative Law*, ed. D. Cracogna, A. Fici, H. Henry, Berlin-Heidelberg 2013, p. 24. However, the basis of this distinction are the economic, but not legal, characteristics of cooperative's and members' relations. In producer and consumer cooperatives, members' involvement consists in concluding agreements with the cooperative for the supply of goods or services. In producer cooperatives, the supplier of goods and services are members of the cooperative. On the other hand, in consumer cooperatives, goods and services are provided by the cooperative to its members. In workers' cooperatives, the involvement of cooperative's members consists in work enabling the cooperative to run an enterprise.

paragraph 1 point 3 of the RESA). In the case of production of electricity, the total installed electric capacity of all renewable energy installations should enable the annual coverage of not less than 70% of the own needs of the energy cooperative and its members and should not exceed 10 megawatts. In the case of production of heat, total available thermal power should not exceed 30 megawatts, and in the case of biogas production, the annual capacity of all installations should not exceed 40 million cubic meters²⁰. Therefore, it should be stated that the production of energy from renewable energy installations is an optional energy cooperative's activity, and the energy cooperative may perform this activity if its articles of association provides for it (article 5 paragraph 2 of the CA). The subject of the obligatory activity of the energy cooperative, prescribed by law, is to balance the demand for electricity or biogas or heat for its own needs and needs of its members.

Article 38f paragraph 1 of the RESA explicitly states that the production of electricity or heat or biogas by the energy cooperative should be performed in the renewable energy installations owned by the energy cooperative or its members. Therefore, it should be stated, that the articles of association of the energy cooperative could provide that members shall contribute to the cooperative by transferring renewable energy installations to the property of the cooperative or to use by the cooperative on the basis of another legal relationship while remaining the property of the member (article 20 paragraph 2 of the CA). However, inclusion of such a provision into energy cooperative's articles of association is not obligatory (article 5 paragraph 1 of the CA and article 5 of the FCA). Therefore, one should assume that production of the electricity or biogas or heat by the energy cooperative, as stated in article 2 point 33a and article 38f paragraph 1of the RESA, should be considered as joint economic activity of the cooperative with its members and in their interests (art. 1 paragraph 1 of the CA). The energy cooperative and its members conduct joint economic activity and such parties provide different benefits to it: members provide energy from renewable energy installations and the energy cooperative balance the demand for it. This thesis is supported by the article 38c paragraph 10 of the RESA, which states that sole activity of the energy cooperative's member, which concerns energy production, is not considered as an economic activity (article 3 of the March 6th 2018 Act — Entrepreneurs Law²¹). By law, the production of energy from renewable energy installation by the energy cooperative's member is not considered as the organized, for profit activity performed on one's own behalf and on a continuous basis (article 3 of the Entrepreneurs Law). Therefore, the energy cooperative's member is not an entrepreneur (article 4 paragraph 1 of the Entrepreneurs Law)²². It should be stated that entrepreneur, who performs

²⁰ The sanction for not complying with the conditions indicated in article 38e paragraph 1 point 3 of the RESA is the rejection of energy cooperative's application for inclusion in the list of energy cooperatives (article 38k of the RESA) or erasure of the energy cooperative from the list of energy cooperatives (article 38l paragraph 1 point 1 of the RESA). The energy cooperative can perform its activity only after inclusion to the list of energy cooperatives run by the Director of the National Agricultural Support Center (article 38f paragraph 2 of the RESA).

²¹ Official Journal of Laws 2019, item 1292, consolidated text with further changes.

²² An entrepreneur is a physical or legal person or a person with no legal personality but with legal capacity, who performs economic activity (article 4 paragraph 1 of the Entrepreneurs Law).

economic activity consisting in production of electricity, heat or biogas is always the energy cooperative, even though the production could be performed only by the energy cooperative's members and the cooperative could solely balance the demand for it. Also, the energy cooperative and its members could not be considered as vertically integrated enterprises under article 3 paragraph 2 of the Council Regulation (EC) No. 139/2004 of January 20th 2004 on the control of concentrations between undertakings (the EC Merger Regulation²³)²⁴.

However, one can wonder, whether the energy cooperative could it be considered as an entrepreneur if its economic activity is not performed for profit (article 3 and 4 of the Entrepreneurs Law). Balancing the demand of energy for the cooperative and its members and providing settlements with the energy company does not results in energy cooperative's profit. On the other hand, the result of settlements by the energy cooperative with the energy company is the reduction of cost of electricity distribution (article 38c paragraph 7 point 2 of the RESA). However, because of the typology of energy cooperatives, such a cooperative should always be considered as an entrepreneur. The energy cooperative has characteristics of the cooperative within the meaning of the CA or the farmers' cooperative within the meaning of the FCA. One of such a characteristic is conducting economic activity (art. 1 paragraph 1 of the CA and article 6 paragraph 1 and 2 of the FCA). However, because the energy cooperative does not produce energy from renewable energy sources for profit, it cannot be considered as an energy enterprise (article 2 point 28 of the RESA and article 3 point 12 of the Energy Law)²⁵.

The energy cooperative should perform its economic activity exclusively for the members whose renewable energy source installations are connected to an area-defined distribution network (article 2 point 33a RESA). This activity limitation indicates who is eligible to become the member of the energy cooperative. The energy cooperative members should be renewable energy installation owners form an area-defined distribution network. Accordingly to the article 38c paragraph 2 of the RESA, the area of the activity of the energy cooperative should be defined on the basis of the connection points of the renewable energy installations of members (producers and recipients of the energy). Also, another RESA provision, included in the article 38e paragraph 1 point 1, states that the energy cooperative shall conduct its activity on the area of a municipality or maximum 3 neighboring municipalities. The maximum number of the energy cooperative members is 999 (article 38e paragraph 1 point 2 of the RESA)²⁶. This regulation is of special character (*lex specialis*) in relation to the regulation of the article 1 paragraph 1 of the CA (*lex generali*) which states that the cooperative is an

²³ Official Journal of the European Union, January 29th 2004, L 24/1.

²⁴ See: M. Pawełczyk, (in:) *Prawo gospodarcze publiczne*, ed. A. Powałowski, Warsaw 2017, p. 13.

²⁵ The energy enterprise should conduct for profit activity in production, processing, transferring, storage, distribution or trading of fuels and energy. See: M. Karpiński, M. Szyrski, (in:) *Prawo energetyczne...*, *op. cit.*, pp. 790–792.

²⁶ The sanction for not complying with the conditions indicated in article 38e paragraph 1 point 1 and 2 of the RESA is the rejection of energy cooperative's application for inclusion in the list of energy cooperatives (article 38k of the RESA) or erasure of the energy cooperative from the list of energy cooperatives (article 38l paragraph 1 point 1 of the RESA).

unlimited association of people. It also limits the open door principle which derives from the Rochdale Principle of the open and voluntary membership in the cooperative²⁷. Additionally, if the energy cooperative is a farmers' cooperative (cooperative within the meaning of the FCA), its members should also be farmers or persons who store, sort, pack and process agricultural products or support agriculture by providing services with the use of machines, tools or devices for the production of agricultural products by farmers (article 4 paragraph 1 point 1 and 2 of the FCA).

4. Conclusions

In Polish law, the energy cooperative should be considered as a subtype of a cooperative within the meaning of the CA or the CFA (farmers' cooperative). The obligatory activity of the energy cooperative is balancing the demand of energy for its own needs and the needs of its members. If the energy cooperative articles of association provides that, the energy cooperative shall also produce energy from the renewable energy sources. The obligatory and optional activity of the energy cooperative is not an economic activity, since it is not performed for profit. However, because of its typology, the energy cooperative should be considered as an entrepreneur (entity performing economic activity), but not as an energy enterprise (since its economic activity does not concern production of energy for profit). The energy cooperative should perform its activity exclusively for its members. Eligibility for membership in the energy cooperative derives from territorial placement of member's renewable energy installations.

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²⁷ According to the open door principle, voluntary membership in the cooperative can be limited only by the requirements of the cooperative's articles of association. However, in the cases of some cooperatives, this kind of limitation is required by the cooperative law. See: A. Kurimoto, (in:) A. Kurimoto, J. Draperi, J. Bancel, S. Novkovic, M. Wilson, L. Shaw, E.L. Cheney, D. Cracogna, *Guidance Notes to the Co-operative Principles*, Brussels 2015, pp. 5–13; L.R. Sánchez Boza, *El principio de adhesiónabierto y voluntaria. Consecuencias jurídicas y económicas de su aplicación práctica, en el cooperativismo costarricense*, Boletín de la Asociación Internacional de Derecho Cooperativo 2017, No. 51, p. 47.

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