

2009 Amendments to the Polish Energy Law

by

Filip Elżanowski*

The changes that occurred to the Energy Law Act of 10 April 1997¹ (in Polish: *Prawo Energetyczne*; hereafter PE) in 2009 were for the most part not the outcome of the Polish legislator directly amending the PE itself. Instead, they were a consequence of the amendment of other legal acts related to the PE in scope adopted primarily due to the need to adjust the Polish legal order to EU law requirements.

The first of the laws amending the PE that entered into force in 2009 was the Excise Tax Act of 6 December 2008². According to the reasoning attached to its draft, the Excise Tax Act was formulated so as to harmonize domestic legislation with its EU counterparts through the introduction of new provisions arising from Council Directive 2003/96/EC of 27 October 2003 on the restructuring of EU framework regulations concerning the taxation of energy products and electrical power³ and Council Directive 2004/74/EC of 29 April 2004 amending Directive 2003/96/EC in relation to the ability of certain member states to apply temporary exemptions and reductions of taxation toward energy products and electrical power⁴. The new Excise Tax Act was also meant to introduce new legal solutions with regard to excise using the experiences gained from the functioning of the Excise Tax Act of 23 January 2004⁵ as well as the recommendations made by the business community.

The Excise Tax Act was subsequently amended in connection with the entry into force of Council Directive 2008/118/EC dated 16 December 2008

* Dr. Filip Elżanowski, Faculty of Law and Administration of Warsaw University; advocate.

¹ Journal of Laws 2006 No. 89, item 625, as amended.

² Journal of Laws 2009 No. 3, item 11, as amended.

³ OJ [2003] L 283/1 as amended.

⁴ OJ [2003] L 157/87.

⁵ Journal of Laws 2004 No. 29, item 257, as amended.

on general principles pertaining to excise tax⁶, which repealed the hitherto so-called horizontal Directive 92/12/EEC the implementation deadline of which expired on 1 January 2010, together with the need to introduce changes resulting from application of excise law.

In connection with the adoption of the Excise Tax Act, Article 41(2)(2) PE was changed on the basis of Article 144 ('Changes to binding provisions'). It stipulates that the Chairman of the Office for Energy Regulation (in Polish: *Urząd Regulacji Energetyki*; hereafter, URE) withdraws a concession granted to a power company in the event of the withdrawal by a director of a relevant customs office of a permit to operate a tax warehouse, or if such permit expires and the entity did not obtain a new permit prior to the expiration of the older one in accordance with principles set forth in separate regulations relating to activities covered by such permit.

From among the laws amending the PE in 2009 only one refers to it exclusively, that is, the Energy Law Amendment Act of 20 February 2009⁷. On its basis, two changes were introduced to the PE. First, Article 23(3) PE received the following wording: 'An opinion from the proper provincial administration is required in matters noted in sec. 2 points 1 and 5, with the exception of those stipulated in art. 32 sec. 1 point 4 and sec. 5', that is, matters concerning the granting and withdrawal of concessions as well as the agreement on draft development plans within the scope of satisfying current and future gas fuel or power needs, with the exception of matters concerning trade in fuels or energy or the receipt of a concession for trade in aircraft fuel, if the annual value of trade does not exceed the equivalent of EUR 1,000,000. The second change introduced by the Act of 20 February 2009 eliminated the duty to obtain a trade concession in relation to commercial activity pertaining to trade in aircraft fuel designated with the symbol PKWiU 23.20.11-40 and covered by the code CN 2710 11 31 provided the annual value of trade does not exceed the equivalent of EUR 1,000,000 (Article 32(5) PE). The minutes of the parliamentary Economy and Infrastructure Committees suggest that these amendments were meant to eliminating obstacles for the development of small local airports and air clubs as well as to exert a positive influence on the development of civil aviation and air tourism in Poland. In the view of the authors of the Amendment Act of 20 February 2009, the resulting changes to the PE will not adversely affect Poland's energy security or the functioning of its fuel and energy markets.

Changes were introduced to the PE by way of the Act dated 4 September 2008 on the Amendment of the Act on trade in financial instruments and

⁶ OJ [2008] L 9/12.

⁷ Journal of Laws 2009 No. 69, item 586, as amended.

certain other laws⁸. According to the reasoning attached to its draft, the Act of 29 July 2005 on trade in financial instruments had to be amended primarily to implement the European Parliament and Council Directive 2004/39/EC of 21 April 2004 on financial instruments markets⁹ and the European Parliament and Council Directive 2006/49/EC of 14 June 2006 on the capital adequacy of investment firms and credit institutions. In addition to the transposition of EU rules, new provisions were also enacted for the further development of the Polish capital market, such as simplified short-sale mechanisms.

Changes to the PE were not considered in the reasoning behind the draft amendment of trade in financial Act; they are simply a consequence of the amendments introduced by this law. Subject to change were primarily PE rules concerning certificates of origin from renewable energy sources. The range of elements that a certificate of origin must include was expanded to cover the identity of the entity that will organise trade in property rights arising from certificates of origin (Article 9e(2)(5) PE). Similarly, the identity of such entity must also be specified in an application for a certificate of origin (Article 9e(4)(5) PE, presently repealed). Finally, an analogous duty was introduced in relation to an application for the issue of a certificate of origin from co-generation (Article 9l(4)(9) PE, presently repealed).

Also modified was the range of entities maintaining registers of certificates of origin (Article 9e(9) PE). Such register is maintained by an entity operating a commodities market within the meaning of the Commodities Markets Act of 26 October 2000¹⁰ or, in the Republic of Poland, a market regulated in accordance with the Act of 29 July 2005 on trade in financial instruments¹¹ that organises trade in property rights arising from certificates of origin. Moreover, the amendment introduced the application provisions concerning property rights arising from green certificates in relation to a register of co-generation origin certificates maintained by an entity operating a commodities market and organising trade on such market of property rights arising from co-generation origin certificates or by an entity operating a regulated market in the Republic Poland¹² and organising trade in property rights arising from certificates of origin from co-generation (Article 9m(1)(2) PE).

The amendment Act of 4 September 2008 established also the scope of the obligation to obtain a concession for commercial activities relating to the trade in fuels and energy. Accordingly, obtaining a concession was required to conduct a business relating to trade in fuels or energy with the exception of:

⁸ Journal of Laws 2009 No. 165, item 1316.

⁹ OJ [2004] L 145/1.

¹⁰ Journal of Laws 2000 No. 103, item 1099.

¹¹ Journal of Laws 2005 No. 183, item 1538, as amended.

¹² Journal of Laws 2005 No. 183, item 1538.

sale of solid fuels; sale of electrical power through an installation with voltage less than 1 kV owned by the recipient; sale of gas fuels if the annual value of trade does not exceed the equivalent of EUR 100,000; sale of liquid gas if the annual value of trade does not exceed the equivalent of EUR 10,000; sale of gas fuels or electrical power on a commodities market within the meaning of the Commodities Markets Act of 26 October 2000 or market organised by an entity operating a regulated market in the Republic Poland within the meaning of the Act dated 29 July 2005 on trade in financial instruments by commodities brokers engaged in commodities brokerage activity on the basis of the Commodities Markets Act of 26 October 2000; sale of heat if the level procured by recipients does not exceed 5 MW (Article 32 point 4 PE, presently altered).

The last of the laws adopted in 2009 that affected the content of the PE was the Act dated 20 November 2009 on the amendment of the Act on environmental protection law and certain other laws¹³. On its basis, the substitute fees that power companies must pay, in accordance with Article 9a(1)(2) and Article 9a(8)(2), constitute now the revenue of the National Environmental Protection and Water Economy Fund and should be transferred to its bank account by 31 March for the previous calendar year (Article 9a(5)5 PE). The introduction of this provision into the PE was a consequence of significant changes made to the scope of the functioning of the National Environmental Protection and Water Economy Fund on the basis of the Act on amendment of the Act on environmental protection law and certain other laws.

¹³ Journal of Laws 2009 No. 215, item 1664.