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## The Duties of the President of the Polish Energy Regulatory Office in the Context of Implementing the Third Energy Package

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## The Duties of the President of the Polish Energy Regulatory Office in the Context of Implementing the Third Energy Package

Filip M. Elżanowski\*

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### *Abstract*

This article presents the duties and powers of the President of the Energy Regulatory Office as the national regulatory authority of Poland within the scope of implementing the Third Energy Package. The article closely examines the changes and omissions connected with implementing the regulations of the Third Liberalization Package. Such implementation has not been fully executed. The biggest shortages are visible in two fields: the realization of the aims of Articles 35

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and 37 of Directive 2009/72/EC. Concerning Article 35 of the Directive, the changes to the legal position of the President of URE (i.e., loosening his ties with the sphere of governmental administration, something strongly advocated by negative developments which have taken place in the legal and constitutional status of the authority over the last six years) have not been implemented.

### *Résumé*

Le Troisième Paquet Énergie contient plusieurs dispositions qui exigent une adaptation au système juridique du pays. Parmi les plus importantes dispositions de la directive 2009/72/CE du Parlement européen et du Conseil du 13 juillet 2009 relative aux règles du marché intérieur de l'électricité se trouvent celles qui concernent le renforcement de la position juridique des autorités de régulation dans les États membres. De plus, aux termes du règlement (CE) n° 713/2009 du Parlement européen et du Conseil du 13 juillet 2009, le Troisième Paquet Énergie a institué une nouvelle autorité – l'Agence de coopération des régulateurs de l'énergie, dont les compétences auront un impact sur le fonctionnement du marché intérieur de l'énergie électrique et l'activité d'autorités de régulation du pays.

Quant à l'adaptation des dispositions mentionnées du Troisième Paquet Énergie au système juridique polonais, il faut faire remarquer que seulement certaines d'entre elles ont été transposées en vertu des derniers amendements de la loi « Droit de l'énergie ». Il faut également souligner que l'adaptation des dispositions de la directive 2009/72/CE renforcera de manière significative la position juridique du Président de l'Autorité de régulation de l'énergie, notamment par le rétablissement du mandat à durée déterminée de sa fonction et le renforcement de son indépendance.

**Classification and key words:** energy law, national regulatory authority, energy market, EU law, Third Energy Package, President of the Energy Regulatory Office.

## **I. Provisions of the Third Energy Package and their influence on the Polish legal system**

### **1. Aims and provisions of the Third Energy Package**

The Third Energy Package was adopted on July 13, 2009. It consists of the five following legal acts: Directive 2009/72/EU of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EU<sup>1</sup>; Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal

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<sup>1</sup> OJ [2009] L 211/55.

market in natural gas and repealing Directive 2003/55/EC<sup>2</sup>; Regulation (EC) No 713/2009 of the European Parliament and of the Council establishing an Agency for Cooperation of Energy Regulators<sup>3</sup>; Regulation (EC) No 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges of electricity and repealing Regulation (EC) No 1228/2003; and Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to natural gas transmission networks and repealing Regulation (EC) No 1775/2005<sup>4</sup>.

The aims of the Third Energy Package were stressed in the very preambles to the legal acts included in the Third Energy Package. The most important of them are: support for the development and unification of the EU's internal electricity and gas markets; support for intersystem exchange on electricity and gas markets; strengthening and deepening the independence of electricity and gas system operators; deepened harmonization of the rights of Member States' regulatory authorities and strengthening their legal position and independence; strengthening consumer rights and protecting vulnerable customers; increasing energy production from renewable sources; increasing energy efficiency; and the creation of the Agency for Cooperation of Energy Regulators (hereinafter: ACER). Because of the above aims the Third Energy Package is also called the Third Liberalization Package.

All the EU Member States were obliged to implement legal, executive, and administrative regulations necessary for the execution of the directives of the Third Energy Package by March 3, 2011. However, the requisite provisions of the Third Energy Package have not yet been implemented to the Polish legal system, excepting a small part which was implemented to the Act of 10 April 1997 – the Energy Law (hereafter, Energy Law<sup>5</sup>) by the Act of 8 January 2010, which amended the Energy Law<sup>6</sup>. In this context it would be worth scrutinizing those provisions of the package which specially influence the legal position of the President of the Energy Regulatory Office (*Urząd Regulacji Energetyki*; hereafter, URE) and evaluating how well these provisions have been implemented into Polish legislation.

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<sup>2</sup> OJ [2009] L 211/94.

<sup>3</sup> OJ [2009] L 211/1.

<sup>4</sup> OJ [2009] L 211/36 with amendments.

<sup>5</sup> Journal of Laws 2006 No. 89, item 625, with further amendments.

<sup>6</sup> Journal of Laws 2010 No. 21, item 104.

## **2. The role and legal position of the national regulatory authorities – the provisions of the Third Energy Package and their state of implementation**

### **A. The duty to guarantee the independence of regulatory authorities**

Directive 2009/72/EC imposes on Member States the duty to guarantee the independence of their energy regulatory authority along with the execution of rights in a neutral and transparent way (Article 35 Para. 4). The directive specifically lists the conditions which must be fulfilled by Member States to meet this obligation. The premises listed in Article 35 are aimed at the ensuring 1) the legal and functional autonomy of the regulatory authority, 2) the functioning of staff independently from market interests and decisions of a political character, 3) budgetary independence and proper human and financial resources, and 4) the terms of offices for members of the managements of the regulatory authority.

According to Article 35 Para. 5 of Directive 2009/72/EC the terms of office should extend over a period of from 5 to 7 years, with the possibility of a single renewal. Moreover, Member States are obliged to ensure a proper system of rotation among the management or top executive positions of the regulatory authority. The members of the management or top executive personnel can be dismissed from their functions during their terms only when they do not fulfill the above-mentioned requirements for independence or when they commit an offence in the meaning of national legislation.

To date the implementation of the provisions of Directive 2009/72/EC into Polish legislation has not been carried out. This requires significant changes to the legal and factual status of the URE President. The URE President is a central authority of the governmental administration (Article 21 Para. 2 of the Energy Law) appointed by the President of the Council of Ministers (i.e., the Prime Minister) on the motion of the minister in charge of the economy. The URE President is subject to the supervision of the minister in charge of the economy, according to Article 9 Para. 3 of the Act on the branches of governmental administration<sup>7</sup>. In the science of administrative law the URE President is called ‘an independent regulatory authority’, but this definition requires more precision. It is pointed out that this does not mean exclusion from the system of public administration. An independent regulatory authority still remains a part of the state administration. The doctrine<sup>8</sup> explains the ‘independence’ of a regulatory authority as a loose hierarchical submission linking the regulatory authority with other authorities.

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<sup>7</sup> Journal of Laws 1997 No. 141, item 943, with further amendments.

<sup>8</sup> See M. Swora, ‘Organ do spraw regulacji gospodarki paliwami i energią’ [in:] M. Swora, Z. Muras (eds.), *Prawo energetyczne. Komentarz*, Warszawa 2010, p. 959.

The independence of the regulatory authority – besides the principle of separation of the function of energy policy from regulatory institutions – constitutes a basic principle of the separation of competences applied to different authorities of public administration, proper within the scope of energy politics of the state<sup>9</sup>. Looking at the legal status of the authority of the URE President it must be noted that his formal and factual independence had been limited together with the development of this institution. This authority was established by virtue of the Energy Law which entered into force on October 11, 1997<sup>10</sup>. In the initial wording of Article 21 of the Energy Law, the URE President was a central authority of the state administration, appointed by the President of the Council of Ministers for a 5-year term. The cases of his dismissal were listed in Article 21 Para. 3 of the Energy Law, to wit: ‘The President of the Office may be recalled by the Prime Minister prior to the completion of the term of office he has been designated for in case of an illness which permanently prevents him from performing their tasks, a blatant misuse of his competences, committing a crime confirmed by a final and binding court sentence, or as a result of resignation’. The legal status of the URE President created by the initial wording of the Energy Law was clearly the most beneficial regarding the independence of the authority, and was closest to the standards created by the Community sources of the Energy Law. It is possible to state that among all the solutions that have appeared during the 14-year history of the authority, the initial model in the fullest possible way tried to separate the regulator both from regulated subjects as well as from the sphere of governmental intervention and current politics. These principles create *ratio legis* of its existence in the legal system of regulatory authorities. According to Tomasz Kowalak<sup>11</sup>, the regulatory authority should be maximally independent from current politics in order to counteract attempts to use the energy sector for current interests, should balance the contradictory interests arising between the realm of politics (i.e., interests of the Ministry of the Economy, tax authorities, environmental protection, ownership policy of the State Treasury, and social policy) and the realm of business (i.e., relations between energy entrepreneurs and customers). Unfortunately, the further development of the legal status of the URE President has brought both significant regress and solutions contradictory to Community legal standards for the legal status of independent regulatory authorities<sup>12</sup>.

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<sup>9</sup> See F. Elżanowski, ‘Relacje pomiędzy ministrem właściwym do spraw gospodarki a Prezesem Urzędu Regulacji Energetyki w sprawach nadzoru nad sektorem energetycznym’ [in:] M. Wierzbowski, R. Stankiewicz, *Współczesne problemy prawa energetycznego*, Warszawa 2010, p. 61.

<sup>10</sup> Journal of Laws 1997 No. 54, item 348, with further amendments.

<sup>11</sup> T. Kowalak, ‘Tworzenie rynku energii elektrycznej i restrukturyzacja sektora energetycznego – spojrzenie regulatora’, (2005) *Biuletyn URE* 1, p. 12.

<sup>12</sup> See W. Hoff, *Prawny model regulacji sektorowej*, Warszawa 2008, pp. 200–201.

Article 21 of the Energy Law was for the first time changed as a result of the amendment which entered into force on January 1, 2002<sup>13</sup>. The new provisions provided that the President of the Council of Ministers appoints the President of URE on the motion of the minister in charge of the economy. The disadvantageous trend in changes to the legal status of the URE President began in 2005<sup>14</sup>. Implemented by virtue of the Act of July 27, 2005 on conducting competition for executive positions in central offices of the state administration, presidents of state agencies and presidents of state purpose funds, the institution of competition as a stage in the appointment of the URE President ('the President of URE, chosen by the way of competition, is nominated by the Prime Minister upon the request of the minister in charge of the economy'; Article 21 Para. 2a of the Energy Law), the amendment simultaneously overruled the above-listed reasons for recalling the holder of the authority, giving the President of the Council of Ministers (i.e., the Prime Minister) the discretion of making such a decision. This decision played a significant role in limiting the independence of the authority. It made possible easy removal of the URE President for purely political reasons<sup>15</sup>. One of the visible results has been that of frequent changes of the holders of the authority since the moment this amendment entered into force. Over the period of 8 years from the day the Energy Law entered into force until the amendment of 2005 the president of the authority did not change. Over the next five years such change occurred 4 times, including once only three months after the office had been taken. The situation worsened after the liquidation of the terms of office of the URE President by virtue of the Act of 4 August 2006 on state cadre reserves and high state positions<sup>16</sup>. The current wording of Article 21 of the Energy Law in force was established by the amendment contained in regulations of the Act of November 21, 2008, on the civil service<sup>17</sup>. Article 21 Para. 2a states: 'The President of the Office is appointed by the President of the Council of Ministers from people belonging to the state cadre reserves, chosen by way of open and competitive draft, on the motion of the minister in charge of the issues of economy. The President of the Council of Ministers recalls the President of the Office.'<sup>18</sup> The European Commission discerns a connection between the appointment and recalling of the holder of the authority by

<sup>13</sup> Journal of Laws 2001 No. 154, item 1802.

<sup>14</sup> See M. Swora, 'Status prawnoustrojowy Prezesa URE' [in:] M. Swora, Z. Muras (eds.), *Prawo energetyczne...*, pp. 965–966.

<sup>15</sup> See B. Nowak, 'Niezależny organ regulacyjny na przykładzie sektora energetycznego' (2010) 9 *Przegląd Ustawodawstwa Gospodarczego*, p. 3.

<sup>16</sup> Journal of Laws 2005 No. 62, item 552.

<sup>17</sup> Journal of Laws 2008 No. 227, item 1505, with further amendments.

<sup>18</sup> See M. Nowacki, 'Zakres niezależności Prezesa URE. Uwagi de lege lata i de lege ferenda w świetle wspólnotowych i polskich regulacji prawnych' (2009) *Biuletyn URE* 1, pp. 62–65.

governmental subjects, totally contradictory to the Directive. Thus, it bears repeating<sup>19</sup> that the gradual deprivation of the URE President's prerogatives of constitutional independence meant to secure the running of an effective and impartial regulatory policy is an especially disturbing development, totally at variance with European trends within the area of the constitutional position of independent regulatory bodies.

The implementation of the provisions of Directive 2009/72/EC regarding the terms of office of a regulatory authority should at least entail a return to the wording of the provisions of Article 21 of the Energy Law concerning the execution of his function by the URE President from the original text of the Energy Law. However the following question should be raised: can even the eventual restoration of the previous legal status fulfill the aim of the Directive? Or is more revolutionary reform of the authority – the URE President – required? As Mariusz Swora rightly pointed out, the evolution of the provisions of the European legislation is going in an absolutely different direction than the trends toward limiting the independence of the President of URE in Polish legislation<sup>20</sup>. It is enough to look at the text of Article 35 Para. 4 of the Directive to notice the significant differences between the Community model for an independent regulator and the Polish legal status of the URE President. First, any regulatory authority should be legally separated and functionally independent from any public or private subject. Today, however, the URE President is appointed by the President of the Council of Ministers (i.e., the Prime Minister) on the motion of the minister in charge of the economy, and can be – at the Prime Minister's discretion – recalled at any moment. This construction deepens the dependence between the holder of the authority and the Prime Minister, being (even in the most 'technical' government) an active politician. It questions the ability of the URE President to undertake (as expected by the provision of Article 35 Para. 5 Point a) 'decisions independent from any political subject'. The strengthening of this independence should be supported by the restoration of the initial norms regarding the legal status of the URE President (lost during the period of the evolution of this institution), as foreseen by the regulation of Article 35 Para. 5 Point b) of the Directive. In details this refers to the restoration of the terms of office (the Directive anticipates a term lasting from 5 to 7 years) and possibility of dismissal only in the case of violating the conditions defined in the Directive or an offence in the meaning of national legislation.

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<sup>19</sup> F. Elżanowski, *Polityka energetyczna. Prawne elementy realizacji*, Warszawa 2008, p. 84.

<sup>20</sup> M. Swora, 'Status prawnoustrojowy Prezesa URE...', p. 996.



It is worth noting that a similar construction to the Directive is that of Great Britain's independent energy regulator<sup>21</sup>. The regulator in the United Kingdom is the Gas and Electricity Markets Authority, known as Ofgem. This office was established on the basis of Utilities Act of 28 July 2000<sup>22</sup>. It is a collegial body, consisting of executive members and non-executive members. The non-executive members fulfill advisory functions and originate from among experts – the executive members, in turn, from the executive staff. The management is headed by a Chairman (who is not an executive member) and the Chief Executive. All members are appointed by the Secretary of State (proper minister, now the Secretary of State for Energy and Climate Changes), Of course, the minister is also a politician, but his role is that of appointment (and in exceptional circumstances of withdrawing the right to be a member of the management). At present the members of the management are appointed for individual terms of office not exceeding 5 years and can be dismissed only by virtue of resignation, losing the ability to be a member of the Management, or committing an offence. The present bulletin regarding the implementation within the scope of the Third Liberalization Package in Great Britain points out the necessity of more detailed fulfillment of the aim of the Directive, for instance by changes in the regulations regarding terms of office<sup>23</sup>. This model could be the inspiration for changes in the legal status of the Polish regulatory authority, however it must be noted that Great Britain is a country with a significantly different constitutional and legal tradition than exists in Poland and automatic copying of its legal solutions will not automatically be a guarantee of success.

It is worth mentioning Marcin Nowacki's proposition<sup>24</sup> to link the URE President with the Parliament. Nowacki justifies his proposal by the fact that the Sejm and the Senate are the highest authority of state authority, executing control over the activity of the Council of Ministers within the scope defined by the provisions of the Constitution and statutes. Moreover he summons the examples of numerous state authorities appointed by the Sejm or the Speaker of the Sejm. These include the Ombudsman, General Inspector of Personal Data, the President of the National Bank of Poland, and the President of the Highest Chamber of State Control. Nowacki recognizes that it would nevertheless be difficult to implement this proposal, due to the necessity of a complete

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<sup>21</sup> For the legal provisions concerning independent energy regulators in France, Germany and Great Britain see B. Nowak, 'Niezależny organ regulacyjny...', pp. 4–6.

<sup>22</sup> Utilities Act 2000, c. 27.

<sup>23</sup> DECC – Department of Energy and Climate Change, *Implementation of the EU Third Internal Energy Package. Government Response*, January 2010, document available at: <http://www.decc.gov.uk/Media/viewfile.ashx?FilePath=Consultations/eu-third-package/1163-eu-third-package-gov-response.pdf&filetype=4&minwidth=true>

<sup>24</sup> M. Nowacki, 'Zakres niezależności Prezesa URE...', pp. 65–66.

reconstruction of the system for authorities of public administration and identical regulation of the status of other independent regulatory authorities. This proposal was nonetheless positively evaluated by Mariusz Swora<sup>25</sup>. What is shown by experience is that the practice of appointing authorities reporting to the Sejm by ordinary majority can also contain the risk of too strong a commitment on the part of a person fulfilling the function of the holder of an authority with current party policy. By adopting the possibility of appointing the URE President by the Parliament it should be proper to secure a term longer than a single term of the Sejm and the Senate (which would fulfill the aim of a term of 5–7 years as in the regulation of Article 35 Para. 5 Point b) of Directive 2009/72/EC) and to introduce the principle of qualified majority.

Independently from the choice of a more radical model for changes during the implementation efforts (or, more probably, a more conservative one), the implementation of the resolutions of Article 35 of Directive 2009/72/EC will influence both the functioning of the position of the URE President and the functioning of the whole unit reporting to him – namely, the Energy Regulatory Office. It should be mentioned that carrying out the duties arising from Article 35 of the Directive requires not only the introduction of proper regulations into the Energy Law guaranteeing the independence of the regulatory authority, but also real measures which could be undertaken on the basis of present legal regulation. Previous practice, supported by the process of legislative changes limiting the independence of the URE President, does not permit us to look forward with optimism at the direction of the development of such an important institution for the Polish economy.

## **B. The duties and powers of national regulatory authorities arising from the establishment of ACER**

Directive 2009/72/EC in Article 37 contains a wide catalogue of duties and powers which are entitled to national regulatory authorities. The listed rights and powers partly constitute the achievements of previous regulations within this scope (i.e., the Second Energy Package). They also constitute the basis for the activities of national regulatory authorities, i.e., the URE President. The catalogue from Article 37 of the Directive also contains new resolutions (in result of other resolutions of the Third Energy Package) and determines new roles for national regulatory authorities.

Among the duties mentioned in Article 37 of the Directive significant attention should be paid to the duties arising from the establishment of the Agency for Cooperation of Energy Regulators (ACER) and the competencies

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<sup>25</sup> M. Swora, 'Status prawnoustrojowy Prezesa URE...', p. 973.

awarded to it. These duties of national regulatory authorities include e.g., cooperation in the realm of cross-border exchange with regulatory authorities of other Member States and with ACER, compliance and implementation of all legally binding decisions of ACER and the Commission, and submitting to the proper authorities of the Member States, ACER, and the Commission annual reports on its activities and the fulfillment of its duties.

The Agency for the Cooperation of Energy Regulators was established by virtue of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009. The Agency was established to support, on the Community level, national independent regulatory authorities aimed at the realization of their duties within the scope of energy regulation and coordination of these activities.

ACER was awarded with far-reaching powers and competencies to issue non-binding acts, and, in defined cases, also ones of a binding character. According to Regulation 713/2009, ACER can issue opinions and recommendations directed to the transmission system operators (TSO) of EU Member States, national regulatory authorities, the European Parliament, Council, and Commission. In cases defined in the Regulation, ACER can issue individual decisions of a binding character. Moreover, ACER monitors the execution of task by ENTSO – the European Network of Transmission System Operators (issuing opinions about the status, regulations, and list of ENTSO members) and presents to the Commission non-binding framework guidelines. Its duty is to secure frameworks for cooperation between national energy regulators. ACER's competencies also include monitoring the internal energy markets of electricity and natural gas, especially the retail prices of electricity and gas, access to networks, including access to energy generated in renewable sources and compliance with consumer rights.

ACER also possesses broad powers regarding electricity network infrastructure. It participates in the elaboration of grid codes, monitors and supervises the implementation of grid codes and guidelines adopted by the Commission, monitors development in the realization of projects aimed at the creation of new capacities for cross-border connections, monitors the implementation of grid development plans of a Community scope, and monitors regional cooperation of transmission system operators. In defined cases ACER is empowered to undertake decisions in regulatory matters which belong to the competencies of national regulatory authorities and which can contain the conditions for access to this infrastructure and the condition of its exploitation safety.

The consequence of integration within the scope of creating the internal energy market is the necessity to establish authorities equipped with powers of a coordinative character supporting cooperation between regulatory

authorities on the Community level. In the longer term it will probably be necessary to establish an authority possessing, in a defined meaning, regulatory rights on the Community level, i.e., referring to the abuse of the principles of the internal market for natural gas and electricity or cross-border cooperation. ACER is not an authority of this type, as its powers do not enter into the competencies of the regulatory authorities of Member States. The issues such as intersystem exchange should no doubt remain within the scope of the authority functioning on the Community level. Thus, the influence on the powers within this scope should be recognized as proper and justified.

The direct effects for the national regulatory authorities, including of course, the President of URE, arising from Regulation 713/2009, entail the duty to cooperate with ACER and the duty to submit reports defined in the Regulation both to ACER and the European Commission. The rights of ACER regarding the regulatory authorities of the Member States were collected in Article 7 of this Regulation and they foresee i.a., the possibility to undertake by ACER individual decisions in technical matters, if such decisions are foreseen in Directive 2009/72/EC, in Directive 2009/73/EC, in Regulation 714/2009, and in Regulation 715/2009. ACER can also issue opinions on decisions handed down by a national regulatory authority. Such an opinion can be issued on the motion of a regulatory authority or the European Commission, and the scope of such an opinion is limited to evaluating the compliance of a decision with the guidelines mentioned in Directive 2009/72/EC, in Directive 2009/73/EC, in Regulation 714/2009, or in Regulation 715/2009 or in other proper provisions of these directives and regulations. The opinion issued by ACER is of a binding character: a national regulatory authority is obliged to comply with it within a period of four months from the day of its reception. If an authority does not comply with the opinion, ACER notifies the European Commission and the given Member State. In the case when a regulatory authority faces difficulties in the application of the provisions of Directive 2009/72/EC, Directive 2009/73/EC, Regulation 714/2009 or Regulation 715/2009, it can submit a motion to ACER asking for an opinion. ACER issues opinions after consultation with the European Commission within a period of three months from the day of reception. It can also issue decisions of a binding character defining conditions of access to the electricity and gas infrastructure connecting at least two Member States.

ACER's duty is also to secure the frames for cooperation for national regulatory authorities and to support cooperation between national regulatory authorities and between regulatory authorities on the regional and Community level and consider the results of this cooperation in the elaboration of opinions, recommendations, and participation on the market in sharing good practices.

Besides the described meaning of the regulations concerning ACER for the harmonization of Community energy law, to date not one regulation of the Package connected with ACER has been implemented into Polish legislation. As Mariusz Swora<sup>26</sup> pointed out, a significant mistake is to leave the question of cooperation within the frames of ACER and cooperation with other international authorization without the scope of duties of the URE President, defined in Article 23 Para. 2 of the Energy Law. One consequence of this negligence is the lack of means from the budget for the realization of the duties which the URE President – as the national regulatory authority in the meaning of the regulation of Article 35 Para. 1 of Directive 2009/72/EC – fulfills on the international scene, within the frames of ACER and the European Group of Supervisory Authorities for Electricity and Gas.

### **C. Other powers and duties of national regulatory authorities arising from the Third Liberalization Package**

A significant part of the resolutions of Article 37 of Directive 2009/72/EC will require implementation into Polish legislation. Above all this includes rights connected with cooperation within the scope of cross-border issues with regulatory authorities of Member States and activities of transmission and distribution system operators<sup>27</sup> of the Regulation 714/2009, and monitoring the time necessary for transmission and distribution system operators for the execution of connections and repairing. No implementation activities within this scope are underway.

## **II. New powers of the President of the Energy Regulatory Office**

### **1. New powers and duties of the President of the Energy Regulatory Office arising from the amendment of the Energy Law**

The Act of 8 January 2010 on the amendment of the Energy Law and on the amendments of some other acts have introduced a number of new duties and powers of the URE President: they were added to the list contained in the provisions of Article 23 of the Energy Law. As mentioned above, they

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<sup>26</sup> M. Swora, 'Organ do spraw regulacji gospodarki paliwami i energią...' p. 963.

<sup>27</sup> I.e., monitoring investment plans of transmission system operators and placing in an annual report the evaluation of investment plans of transmission system operators within the scope of their compliance with the development plan of the grid of community range, described in Article 8 Para. 1. Point b).

implement these powers only partly. In particular, the provisions arising from the Regulation establishing ACER, awarded rights and duties imposed on Member States, have not been implemented.

The Act on the amendment of the Energy Law and on the amendment of other acts implements Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerns measures to safeguard electricity supply and infrastructure investment<sup>28</sup>. This act also contains changes aimed at the application of amendments to the Regulation No. 1228/2003/EC of the European Parliament and of the Council of 26 June 2003 on the conditions for access to the network for cross-border exchanges in electricity<sup>29</sup> implemented by the decision of the European Commission of 9 November 2006.<sup>30</sup> The powers and duties of the URE President implemented by virtue of the act on the amendment of the Energy Law and on amendments of some other acts with division regarding the subject of these powers will be discussed below.

## **2. Characteristics of the new powers of the President of the Energy Regulatory Office and their classification in terms of competencies**

The widest group of new powers for the URE President regards the functioning of the electricity market at large. They are foremost aimed at supporting competitive conditions on the energy market, supporting its development, and protecting consumer rights.

One of the most important powers awarded to the President of URE by virtue of the amending act concerns controlling the execution of duties arising from Article 49a Paras. 1 and 2 of the Energy Law (Article 23 Para. 4a of the Energy Law). Article 49a of the Energy Law implements a duty to trade a defined percentage of energy generated in a given year by an energy company, publicly, transparently, and openly on the power exchange, on the regulated market, on an Internet trade platform, or in the form of a tender. In connection with the introduction of this duty the URE President was awarded the powers to invalidate, in defined cases, a tender for electricity sales and to grant to generators, in the form of an administrative decision, a release from a duty to sell a defined quantity of energy in the public procedure.

According to Article 23 Para. 2 Point 18 of the Energy Law, the URE President collects and processes information regarding energy companies, calculates and publishes, by March 31 of each year, the average sales price of electricity generated in high-efficiency cogeneration, electricity on the

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<sup>28</sup> OJ [2006] L 33/22.

<sup>29</sup> OJ [2003] L 176/1 with further amendments.

<sup>30</sup> OJ [2006] L 312/59.

competitive market and the way of its calculation, and heat generated in generation units which are not cogeneration units and belong to enterprises possessing licenses. Moreover the URE President issues certificates on the origin of electricity from biogas and supervises the fulfillment of the purchase of these certificates by energy companies (Article 9a Para. 1 Point 1 of the Energy Law).

The second group of powers awarded to the URE President consists of those concerning the functioning of electricity and gas systems. Within this scope the URE President was awarded with competencies to approve full Transmission Grid Code and Distribution Grid Code, which, according to Article 9g Para. 12 of the Energy Law, constitute an integral part of a contract for performing transmission and distribution of energy and gaseous fuels or a complex contract. Moreover the URE President was awarded the power to nominate for a period defined via an administrative decision, the transmission system operator, the distribution system operator, the system of storage, the system of natural gas liquefaction and operator of combined system, and to define the area, grid, and installation on which this activity will be performed. The power to nominate system operators was awarded to the URE President also in the former legal status, but in the actual wording of Article 9h of the Energy Law was supplemented by a new procedure for nominating operators (i.e., on the basis of a contract regarding entrusting the operator's functions)

Beyond this, with the implementation of Directive 2005/89/EC concerning measures to safeguard electricity supply and infrastructure investment, the competencies of the URE President were widened to include the rights and duties arising from the Directive mentioned above regarding the security of the national electricity system, i.e., monitoring activities of operators in the case of dangers regarding the security of electricity supplies and elaborating opinions on operators' reports and submitting recommendations to the minister in charge of the economy.

The URE President was also awarded with the power to control the realization (by the electricity transmission system operator or combined electricity transmission system operator and by other participants of the electricity market) of duties arising from Regulation No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges of electricity and repealing Regulation (EC) No 1228/2003 and also executing other duties of the regulatory authority arising from this Regulation (Article 23 Para. 2 Point 11 of the Energy Law).

As mentioned above, due to the approval of the Act of 8 January 2010 on the amendment of the Energy Law and on amendments to some other acts,

the legislator executed only partial implementation of the resolutions arising from the Third Energy Package. This Act implemented Directive 2005/89/EC concerning measures to safeguard electricity supply and infrastructure investment and introduced changes supporting the application of changes of Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.

The powers awarded to the URE President by virtue of the Act of 8 January 2010 significantly widened the competencies of the URE President regarding the regulation of the electricity market, but they have not strengthened his legal position satisfactorily. One direct consequence of broadening the catalogue of his powers is that of broadening the catalogue of behaviours of energy companies covered by sanctions due to abuse of provisions of the Energy Law (Article 56 of the Energy Law).

### III. Conclusions

The above analysis points out both changes and omissions connected with the implementation of the regulations of the Third Liberalization Package. It must be emphasized that full implementation has not been achieved. The biggest shortcomings are visible in two fields: the realization of the aims of Articles 35 and 37 of Directive 2009/72/EC. Within the scope of the implementation of Article 35 of the Directive the changes to the legal position of the URE President, (i.e., loosening his ties with the sphere of governmental administration, something strongly advocated by negative developments which have taken place in the legal and constitutional status of the authority over the last six years) have not been implemented. One minimal step in the proper direction would be the return of the guarantee of independence which the President of URE possessed at the beginning of his functioning (directly after the establishment of this authority in 1997), along with terms of office, and security from early recall due to reasons beyond current politics, guaranteed by defined reasons for his recall. It would be worth considering a far-reaching redefinition of the presence of the URE President within the structure of governmental administration – for instance, his exclusion from supervision by the minister of the economy, or, as other representatives of the doctrine propose, to subordinate independent regulatory authorities to the Parliament. Subsequently, within the scope of implementing Article 37, we are compelled to negatively evaluate the lack of implementing issues connected with cross-border cooperation with regulatory authorities of the Member States and



connected with the establishment of ACER and the activity of the transmission and distribution system operators. Within this scope, only full implementation of the resolutions of the Directives contained in the Third Energy Package will bring real and far-reaching changes and also will place before the URE President new challenges and newly defined duties. The deadline for the implementation of Directive 2009/72/EC and 2009/73/EC was March 3, 2011.

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