

European Commission

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Unit B2 – Prevention of Technical Barriers

e-mail: Grow-Notif-Infractions@ec.europa.eu

Date: 14. 06. 2018

RE: Objections to the Act amending the Act on the system for monitoring and controlling fuel quality and the National Treasury Administration Act, according to the notification procedure No. 2018/98/PL

Dear Sirs,

we are writing you on behalf of **Zaměstnavatelský svaz důlního a naftového průmyslu** (the **Association of the Mining and Oil Industry Employers**), Registered Office: Plzeňská 276/298, Motol, 150 00 Prague, Czech Republic, Company Registration No.: 15273725 (hereinafter referred to as the “**ZSDNP**”) with regard to the following matter.

It is known to the ZSDNP that the Republic of Poland is planning to adopt the following legal regulation: “Act amending the Act on the system for monitoring and controlling fuel quality and the National Treasury Administration Act”. The bill was submitted to the European Commission for notification on March 14, 2018, in accordance with the procedure stipulated by EU Directive 2015/1535, Ref. No. **2018/98/PL**. We believe that the **amendment as it has been notified constitutes a barrier to free trade inconsistent with EU law**, in particular with Art. 34 of the TFEU; in the light of the form of the proposed amendment, its otherwise legitimate objectives are not sufficient to justify the application of the relevant exception pursuant to Art. 36 of the TFEU, if applicable. This conclusion will be further explained in the text that follows.

In this letter, we would like to inform you in greater detail of our findings and direct your attention to the fact that the above-mentioned bill does not comply with the European law.

Brief Introduction of ZSDNP

The ZSDNP is a voluntary independent organization that represents mining entrepreneurs and employers. It consists of a total of 24 organizations (in particular, major joint-stock companies

and state-owned companies with activities in the coal, metal ore, non-metal ore and oil industries) with nearly 33,000 employees. The ZSDNP itself is, for instance, a member of EURACOAL, it takes an active part in the commission of the UNECE's group of experts on cleaner coal production in Geneva and collaborates with the International Organizing Committee of the Mining World Congresses (IOC WMC). The main mission of the ZSDNP is to defend the interests of its members and to formulate and promote their goals in negotiations with state administration bodies or other bodies and institutions.

The organizations associated in the ZSDNP also include a number of companies engaged in the trade of Czech sized lignite, including companies employing thousands of employees.

A significant part of the production of Czech sized lignite is sold in the Republic of Poland, which clearly explains why the above-mentioned amendment is of direct concern to the ZSDNP and its members. The ZSDNP and other organizations it associates have a substantial interest in the absence of barriers to free trade within the EU. Free trade is one of the fundamental pillars of the EU and its preservation is, after all, not only in the interest of the ZSDNP and its members, but a matter of importance for all involved, as we believe.

Amendment of the Polish Act and Violation of the Free Movement of Goods Regulation

As has been mentioned above, the Republic of Poland is planning to adopt an amendment to the Act amending the Act on the system for monitoring and controlling fuel quality and the National Treasury Administration Act (hereinafter referred to as the "**Amendment**"). On March 14, 2018, the Amendment was submitted to the European Committee for notification in accordance with the procedure stipulated by EU Directive 2015/1535, Ref. No. **2018/98/PL**.

In Art. 1(2) b)¹, the Amendment includes a list of solid fuels, including also hard coal (and related products) and lignite. After that, however, the Amendment gives lists of products in Art. 5 a) and b)² whose placing on the Polish market for use in households or combustion plants with an output of less than 1 MW is prohibited. As the list explicitly mentions lignite, it must be concluded that the amendment completely prohibits the import/sale of lignite for residential combustion or combustion plants with a rated thermal output of less than 1 MW. On the other hand, hard coal is explicitly referred to as "permitted" solid fuel for which parameters of quality are to be determined in form of a regulation.

We believe that the **Amendment as it has been notified creates a barrier to free trade inconsistent with EU law**, in particular, with Art. 34 of TFEU, for several reasons.

1. The problem consists in the fact that the Amendment *a priori* actually prohibits the import/sale of lignite without considering the parameters of its quality (permitting, on the other hand, the import/sale of hard coal of similar parameters of quality as for some types of Czech lignite). The parameters of quality are (or will be) determined only for products that are explicitly permitted, such as hard coal. One of the main objectives of the Amendment is to improve the quality of air, however, the Amendment completely ignores the fact that the parameters of quality of Czech lignite

¹ i.e., Amendment Art. 2(1)4a of the Act

² i.e., new Article 7a and paragraph 8 of the Act

are entirely comparable with the required parameters of quality of hard coal, while some of the parameters decisive for the quality of air are even superior.

To illustrate this, we have compared some of the required parameters of quality for hard coal as specified in the relevant draft regulation by the Polish Minister of Energy³ (hereinafter referred to as the “**Regulation**”) with parameters of Czech lignite, type “nut 2”, which we consider comparable and therefore suitable for this comparison⁴:

			Regulation		Czech lignite – “nut 2”	
			Values		Values	
parameter	symbol	unit	min	max	min	max
Ash content	Ar	%	-	14.00	-	12.00
Total sulphur content	Str	%	-	1.80	-	1.70
Calorific value	Qir	MJ/kg	21.00	-	20.00 ⁵	-
Grading	-	mm	5.00	40.00	10.00	25.00

The above table clearly shows that the key parameters of Czech lignite type “nut 2” in terms of health protection are more favourable (and therefore more suitable) than the parameters required for hard coal, which has been permitted. It is absurd to prohibit *a priori* the sale/import of such high-quality Czech lignite while permitting the sale/import of lesser quality hard coal. It would be easy to fulfil the objective of the Amendment while preserving the free movement of goods if the Amendment defined, for example, parameters of quality for lignite⁶ similar (but not discriminatory) to those set for hard coal.

Overall restrictions on the sale (import) of lignite do not make sense and are indicative of arbitrary discrimination and disguised restrictions on trade between Member States in consequence of the adoption of the Amendment.

2. The ZSDNP is not aware of there being any other EU country with such selective prohibition of the sale of solid fuels imposed solely on lignite. On the contrary, our reasoning is based on Directive 2009/125/EC in conjunction with the EU implementing regulations 2015/1189 and 2015/1185 with regard to ecodesign requirements for solid fuel boilers and local space heaters, where lignite is explicitly referred to as solid fuel that can be burned in such installations. As a result of implementation of the Amendment, this would be clearly made impossible, which

³ Regulation by the Minister of Energy on the requirements for the quality of solid fuels, draft from February 1, 2018.

⁴ Due to the different grading methodology, Table 3 of the Regulation has been chosen for comparison of type “pea” coal with the Czech lignite type “nut 2”, which is similar. For simplification, only the parameters relevant from the point of view of the environment protection focused on by the Amendment have been included in the comparison.

⁵ Pursuant to Section 2(3) of the Regulation, this figure is still within the limits.

⁶ Clearly only within the limits set by European law.

would mean violation of Art. 6 of Directive 2009/125/EC, which forbids Member States to prohibit, restrict or impede the placing on the market or putting into service of products that comply with all the relevant provisions of the applicable implementing measure.

In order to ensure the free movement of goods, Art. 34 of the TFEU prohibits “quantitative restrictions on imports and any measures with equivalent effect”. In view of the above, we believe that the **Amendment is inconsistent with the prohibition set out in Art. 34 of the TFEU and its introduction thus constitutes a violation of the free movement of goods within the meaning of Art. 34 of the TFEU by introducing an unprecedented prohibition on imports of lignite into Poland for use in households or combustion plants of less than 1 MW while explicitly permitting the sale of comparable solid fuels.**

Exception, Disguised Restriction on Trade between Member States

For the sake of completeness, it should be noted that Art. 36 of the TFEU allows, under certain conditions, some prohibitions or restrictions on imports (exports or transit). However, we believe that the application of Article 36 of the TFEU in the present case is excluded for the following reasons.

Article 36 of the TFEU allows the introduction of “prohibitions or restrictions on imports, exports or goods in transit on grounds of public morality, public policy, public security, the protection of health and life of humans and animals, the protection of plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property” which must not constitute “a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

As mentioned above, one of the main purposes of the Amendment is to improve the quality of air, which could fall within the category of “protection of the health and life of humans and animals” in accordance with Art. 36 of the TFEU. Yet, this argument cannot succeed when comparing the parameters of quality of the “permitted” solid fuels (e.g., hard coal) with the “prohibited” solid fuels (e.g., lignite). This reasoning is unambiguously supported by the above table.

The above table clearly shows that the protection of health, which is the objective of the Amendment, could be equally well ensured by the use of Czech lignite (e.g. the “nut 2” type) whose sale (import) is to be prohibited as opposed to hard coal. As stated above, the objective of the Amendment would be easily achievable for instance by setting parameters of quality for lignite⁷ similar (but not discriminatory) to those set for hard coal while maintaining the free movement of goods.

The possibility of applying an exception under Art. 36 of the TFEU is therefore to be considered as excluded in this case.

⁷ Clearly only within the limits set by European law.

Conclusion

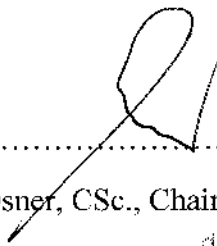
The above text makes it clear that the Amendment leads to a total prohibition on trade in lignite and that such prohibition constitutes a barrier to trade between Member States and interferes with the free movement of goods, i.e., it is inconsistent with Art. 34 of the TFEU.

Despite the fact that the Amendment aims to improve the quality of solid fuels used in residential combustion or combustion plants with a rated thermal output of less than 1 MW and thus, ensure better health protection, this cannot constitute the reason for applying an exception under Art. 36 of the TFEU, when “prohibited” solid fuels (lignite) can meet similar parameters of quality as the “permitted” solid fuels (hard coal), and thus have similar environmental impact.

The ZSDNP would hereby like to ask the Commission to ensure the conformity of the Amendment with EU law, in particular, to ensure that the Amendment permits placing of lignite on the Polish market under conditions comparable to other solid fuels. We would therefore like to ask the Commission to refuse to approve the Amendment without prior changes resulting in the permission of sale/import of lignite in the territory of the Republic of Poland on a basis similar to that applied to hard coal.

Best regards,

Association of the Mining and Oil Industry Employers (ZSDNP)



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