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# The Future of Conventional Coal Plants in the Light of the International Law and the European Law

## Abstract

Climate change is one of the key civilisational issues. This change is caused by greenhouse gas emission. Stopping this change requires multidirectional actions on a global scale, primarily limiting the combustion of fossil fuels. What reaches towards these needs is the proposals of the international community, which are determined in the protocol of 15 December 2015 (called the Paris Agreement). The legal framework for the strategy of implementing it in the European Union and the member states is formulated by the legislative package “Clean Energy For All Europeans”. The directions and terms of developing the economy pose particular challenges for Poland which plans to maintain the significant role of coal in the energy industry for decades.

Government documents show that the government of the Republic of Poland will not decide on the spectacular decarbonisation of the economy. It cannot be obligated to do it, either, due to the treaty conditions. However, the future of the coal energy industry seems prejudged. This results from the development directions of European economic-legal instruments which serve the direct (determining binding emission standards and environmental quality standards) and indirect (through influencing the prices of greenhouse gas emission allowances) rationing of the activity of entities from the energy sector in the environment.

**Keywords:** climate change, Paris Agreement, legislative package “Clean Energy For All Europeans”, decarbonisation of economy, energy mix

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The European Union actively participates in creating the framework of the world power policy, targeted particularly at protecting the climate and reducing CO<sub>2</sub> emission. This is proven especially by the role that it played in developing the Paris Agreement. Its realisation is served by new or amended legal acts, making a complex transformation of the European power policy, becoming one of the main factors of the transition towards a low-carbon economy. These new regulations also define the future of conventional coal plants, but not in the form of direct orders or prohibitions, but indirectly, primarily shaping the conditions of engaging in business activity in the environment, that is, the conditions of using the environment and making changes in it.

## Introduction

The Polish energetics is based mainly on installations in which fossil fuels are combusted. The significance of other sources in the generation of energy and heat is smaller, though it increases gradually. The percentage of renewable energy sources (so-called RES) in the final consumption of gross energy amounted to 13% in 2018, of which 1.4% was the combustion of biomass, and 11.6% constituted other sources, water plants included.<sup>2</sup>

Out of all renewable energy sources, the greatest role is played by wind power. After the slowdown of investments in the land wind energy industry, a result of limitations introduced by the provisions of the Act of 20 May 2016 on Investments Regarding Wind Plants,<sup>3</sup> hope for its further development lies mainly in the sea wind power industry. Due to the weather, sea wind turbines guarantee greater stability and efficiency of the energy generated.<sup>4</sup>

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<sup>2</sup> H.L. Gabryś, *Elektroenergetyka w Polsce 2019*, "Energetyka" 2019, 1, p. 15.

<sup>3</sup> Journal of Laws of the Republic of Poland, item 961. This is primarily about introducing the so-called 10h principle. Article 4 section 1 of the Act provides for the fact that the distance in which wind power plants may be located and constructed must be equal to or greater than the decuple of its height, measured from the ground level to the highest point of the building, including technical elements.

<sup>4</sup> Within the Polish sea areas, there are beneficial conditions for the construction of sea wind plants, allowing for up to 10 GW a year (in 2017, the total power installed in the national power network reached 43 GW).

Some expectations are also associated with gas, but high prices of this resource remain an obstacle in the wider consumption of it for the purpose of energy. It is its advantage that it has the lowest CO<sub>2</sub> emission factor of all fossil fuels. There is no access to the necessary resources of this fuel in Poland until the completion of the Baltic Pipe, planned for 2022. Gas blocks could play the role of backup power sources, securing the provision of energy from renewable sources, dependent from the weather. However, this function will be overtaken by the new blocks of coal plants, which is indicated by the motives for passing the Act of 8 December 2018 on Power Market,<sup>5</sup> successfully notified to the European Commission.

It seems decided that a nuclear power plant will be constructed, though this type of investment is not only expensive, but also time-consuming. In this regard, it is planned that the first block of the nuclear power plant with a power of 1–1.2 MW will be connected to the energy network in 2033. In later years (up to 2043), five more blocks with a similar power will be launched.<sup>6</sup>

For the reasons given above, the main energy resource in Poland is still hard coal and lignite. Its combustion generates ca. 77% of energy.<sup>7</sup> There are also new investments, making use of that fuel, in progress. In 2018, a new block in the Kozienice Plant, and later the next ones in the Opole Plant and in Jaworzno were put into operation. The flag investment is the construction of the block C of the plant in Ostrołęka, which started in October 2017. Its planned power is 1,000 MW. According to the earlier government plans, this was supposed to be the last investment of this type in Poland, but it is not obvious now any more.<sup>8</sup>

The combustion of coal, both lignite and hard coal, causes the generation of many hazardous substances and compounds which enter the environment. Mercury is particularly dangerous.<sup>9</sup> The world public opinion has been thrilled by emissions of greenhouse gases, including seemingly harmless carbon dioxide, for quite a long

<sup>5</sup> Journal of Laws, item 9 as amended.

<sup>6</sup> Point 2.3.1. of the draft National Plan for Energy and Climate 2021–2030.

<sup>7</sup> In 2018, coal constituted 76.2% of fuels consumed in the Polish electricity – 29.1% was lignite, and 47.1% was hard coal. See H.L. Gabryś, op. cit., p. 15.

<sup>8</sup> P. Bednarz, *Będą kolejne elektrownie na węgiel? Może się to zemścić jeszcze droższym prądem*, <https://businessinsider.com.pl/finanse/energetyka-weglowa-prad-moze-byc-jeszcze-drozszy/fsck7mn> (access: 15.12.2018).

<sup>9</sup> It is claimed that mercury, next to plutonium, is one of the most harmful elements to humans. The plant in Bełchatów emitted 2.82 tons of mercury to the atmosphere in a year, following the combustion of lignite. This is more than the in the case of the entire Spanish industry. The Polish and the German are both responsible for 1/3 of the European mercury emission. See D. Wantuch, *Polskie elektrownie trują Europę rtęcią*, <http://wyborcza.pl/7,155287,23492684,polskie-elektrownie-truja-rtecia-belchatow-najwiekszym-trucicielem.html> (access: 5.06.2018).

time now.<sup>10</sup> They create environmental problems which were unknown before, primarily causing the so-called greenhouse effect which leads to global climate change. Work is undertaken on the development of clean coal technologies for the power industry,<sup>11</sup> but they do not seem able to stop the tendency to withdraw from coal, which is called decarbonisation. It sets the tone of the power policy of the European Union (hereinafter referred to as the EU) and its member states, but it also significantly influences the politics of other countries which are the parties to the Paris Agreement.<sup>12</sup> At the same time, the list of states declaring a complete withdrawal from coal consumption. The announced changes in local legal orders follow political declarations.<sup>13</sup>

The new energy policy of the EU is targeted particularly at protecting the climate and reducing the emission of CO<sub>2</sub>, until the achievement of the so-called coal neutrality in 2050. It is based on new or amended legal acts, adopted in 2018 and 2019, which make a complex transformation of the European energy policy, focusing on such key issues as energy efficiency,<sup>14</sup> renewable energy sources,<sup>15</sup> the energy

<sup>10</sup> Greenhouse gases also include, next to CO<sub>2</sub>, methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O) and so-called fluorised greenhouse gases (HFC, PFC and SF<sub>6</sub>).

<sup>11</sup> A. Ziębik, P. Gładysz, *Analiza systemowa elektrowni ze spalaniem tlenowym węgla zintegrowanej z wychwytem CO<sub>2</sub>*, "Energetyka" 2016, 2, p. 67 ff. Although at the current stage of development, these technologies are uneconomic, nevertheless, with the development of such technologies, there is hope in Poland regarding the maintenance of lignite mining after the year 2030. See the draft National Plan for Energy and Climate 2021–2030, p. 105 (point 3.3.4.). See T. Olkusi, K. Piwo-warczyk-Ściebura, A. Brożek, *Wpływ porozumienia paryskiego i systemu EU ETS na rynek węglowy*, "Zeszyty Naukowe Instytutu Gospodarki Surowcami Mineralnymi i Energią PAN" 2017, 98, p. 101.

<sup>12</sup> Agreement of 15 December 2015 on Climate Change, adopted during the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change; hereinafter referred to as: "the Paris Agreement" (Official Journal of the EU of 19 October 2016, L 282, p. 5). Further discussed in section 2.

<sup>13</sup> For instance, in France in April 2019, a draft act providing the legal status for the climate objectives, including the idea of achieving "coal neutrality" by 2050. Great Britain and Italy are planning to close their coal plants by 2025, Greece projects the decarbonisation of the economy by 2028, whereas the Netherlands and Hungary – by 2030. See K. Oroschakoff, *Walka z globalnym ociepleniem – jeszcze jedno pole konfliktu między Wschodem i Zachodem Europy*, <https://wiadomosci.onet.pl/politico/walka-z-globalnym-ociepleniem-jeszcze-jedno-pole-konfliktu-miedzy-wschodem-i-zachodem/fnq12e7> (access: 14.05.2019).

<sup>14</sup> Directive (EU) 2018/844 of the EP and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency (L 156, p. 75), and Directive (EU) 2018/2002 of the EP and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency (L 328, p. 210).

<sup>15</sup> Directive (EU) 2018/2001 of the EP and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) (L 328, p. 82).

market<sup>16</sup> and the Energy Union management.<sup>17</sup> Most of these acts refer directly to the legislative announcements included in the Communication of the European Commission of 30 November 2016 “Clean Energy For All Europeans”,<sup>18</sup> the title of which is used in the literature and commentaries to mark the whole package of these new legal solutions.<sup>19</sup> In the Communication, the creation of the Energy Union was announced. It is to become one of the main factors of a transition towards a low-carbon economy. By the way, the role of the European Union (hereinafter referred to as the EU) in developing the Paris Agreement was proudly emphasised in the Communication.<sup>20</sup>

The adopted directions and principles of the power industry in the EU pose particular challenges for Poland which plans to continue to maintain the significant role of coal for decades. The analysis and evaluation of these new legal solutions, conducted with the consideration of their impact on the development of the Polish energetics, is the subject of considerations in section 2.

It has already been mentioned that the installations used for the energy combustion of fuels also have a negative influence on elements of the environment which are other than the climate,<sup>21</sup> primarily on water and the air. These impacts did not go unnoticed by the European legislator, either, leading to restricting the emission requirements over the years. The provisions of secondary law also exercise influence over the functioning of the energy sector. On the one hand, this is about Directive 2000/60/EC of the EP and of the Council of 23 October 2000 establishing

<sup>16</sup> Regulation (EU) 2019/943 of the EP and of the Council of 5 June 2019 on the internal market for electricity (recast), (L 158, p. 54) and Directive (EU) 2019/944 of the EP and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), (L 158, p. 125).

<sup>17</sup> Regulation (EU) 2018/1999 of the EP and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (L 328, p. 1), as well as Regulation (EU) 2019/942 of the EP and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (Official Journal of the EU L 158, p. 22).

<sup>18</sup> COM (2016) 80 final.

<sup>19</sup> Also called “Winter package” in the literature.

<sup>20</sup> F. Pause, “Saubere Energie für alle Europäer” – Was bringt das Legislativpaket der EU?, “Zeitschrift für Umweltrecht” 2019, 7–8, p. 387 ff.

<sup>21</sup> Pursuant to the definition in Article 3 point 39 of the Act of 27 April 2001 – Environment Law (i.e. Journal of Laws of 2009 item 1396, 1403, 1495, 1501, 1527, 1579, 1680, 1712), whenever the environment is mentioned, it is understood as the entirety of natural elements, including modified ones, as a result of human activity, particularly the ground, minerals, waters, air, landscape, climate and other elements of biological diversity, as well as mutual interactions between those elements.

a framework for Community action in the field of water policy<sup>22</sup> (hereinafter referred to as the Framework Water Directive, with executive directives. On the other hand, this is about Directive 2010/75/EU of the EP and of the Council of 24 November 2010 on industrial emissions,<sup>23</sup> which is of key importance for the functioning of ca. 52,000 biggest industrial installations in the EU. The conclusions drawn from the analysis of those provisions are presented in sections 3 and 4.

## The Legal Framework of the Climate Policy

The modern energy and climate policy is global. Its underlying goals, that, ensuring an environment-friendly, reliable and affordable supply of energy cannot be fully achieved within autarkic economic and legal systems. In this regard, a special role is played by the international law as well as the European law.<sup>24</sup>

### The Paris Agreement

A legal-international platform for the development and achievement of global climate goals is what particularly the Paris Agreement of 15 December 2015 is becoming.<sup>25</sup> It was adopted in the form of a protocol during the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change.<sup>26</sup> It entered into force on 4 November 2016.<sup>27</sup>

The Agreement ensures the continuation of the policy paved by the Kyoto Protocol, negotiated during the 3rd Conference of the Parties to the Climate Convention on 11 December 1997, and applicable since 16 February 2005.<sup>28</sup> The Kyoto Protocol still produces legal effects, notwithstanding, as J. Ciechanowicz-McLean notes,

<sup>22</sup> Official Journal of the EU L 327 of 22 December 2000, as amended.

<sup>23</sup> Official Journal of the EU L 334, p. 17.

<sup>24</sup> Ch. Kreuter-Kirchhof, *Emissionshandel und Erneuerbare Energien Richtlinie. Instrumente zur Umsetzung der Klimaschutzstrategie der EU*, "Zeitschrift für Umweltrecht" 2019, 7–8, p. 396 ff.

<sup>25</sup> See note 14.

<sup>26</sup> Hereinafter referred to as "the Climate Convention". Prepared in New York, 9 May 1992 (Journal of Laws No. 53, item 238).

<sup>27</sup> Compared to the Kyoto Protocol, its ratification was very quick, after meeting the requirement of ratification by at least 55 countries responsible for at least 55% of global greenhouse gas emissions. The Agreement was ratified by the EU on 5 October 2016.

<sup>28</sup> Journal of Laws of 2005 No. 203, item 1684.

after completing the activities covered by the second settlement period,<sup>29</sup> the functioning of institutions provided for in it will become obsolete, will lead to the cessation of its execution and to the submission of an application for its revocation.<sup>30</sup>

It may be assumed that the Kyoto Protocol fulfilled its historical role. It aimed at strengthening the role of law in counteracting the climate change, at least compensating for the shortcomings of the Climate Convention itself.<sup>31</sup> It also deserves emphasising that it established three innovative instruments which serve supporting the objectives which were constituted in it.<sup>32</sup> On the other hand, it was unable to provide for the accomplishment of the desired objectives on a global scale. Although it expressly established the tasks of industrialised states regarding the reduction of the emission of greenhouse gases (included in Annex B on the basis of the percentage model), it did not provide for any obligations for developing states, such as China, which is the world leader in CO<sub>2</sub> emission. From the very beginning, this asymmetry of obligations was the source of serious controversies.<sup>33</sup> Methodological uncertainties related to the calculation of NH<sub>2</sub> emission from farming sources, as well as omitting the phenomenon of the absorption of the greenhouse gases by forests were also pointed out.<sup>34</sup> Opinions are expressed that the Kyoto Protocol in fact became an internal affair of the EU, making it possible for the European Commission to engage in intensive regulating actions, while

<sup>29</sup> This is about the years 2013–2020, covered by the reducing emissions targets on the basis of so-called Doha Amendment to the Kyoto Protocol in Doha on 8 December 2012. The thing is, the Amendment did not enter into force because it was not ratified by a sufficient number of parties, incl. The Republic of Poland. Any further obligations related to reducing emission after 2020, are definitely not provided for within the Kyoto Protocol. See Statement of reasons for the draft Act on Ratifying the Paris Agreement. Sejm, VIII term, bill No. 886 (Uzasadnienie rządowego projektu ustawy o ratyfikacji Porozumienia paryskiego. Sejm VIII kadencji, druk nr 886).

<sup>30</sup> J. Ciechanowicz-McLean, *Implementacja Porozumienia Paryskiego w sprawie ochrony klimatu*, "Gdańskie Studia Prawnicze" 2017, 38, p. 493.

<sup>31</sup> The framework nature of the Convention influenced the abandonment of specific reducing duties of states in favour of establishing quite general terms of acting in the field of the economic and environmental policy. See J. Ciechanowicz-McLean, *Problemy prawne umów międzynarodowych z zakresu ochrony klimatu*, "Gdańskie Studia Prawnicze" 2016, 36, p. 108 ff.

<sup>32</sup> That is emission trading, joint implementation, clean development mechanism. Ibidem, p. 113.

<sup>33</sup> This led to e.g. the fact that Canada ratified the Protocol to withdraw from it in 2009. Both the USA and the EU made attempts to convince developing countries during negotiations to undertake the reduction obligations, but without any success. Also exceptions for the former socialist states contributed to the watering of the duties of the member states of the European Community. It is claimed that at the time of signing the Protocol, chances for its success were scant. See Ch. Streck, *Vertragsgestaltung im Wandel der internationalen Klimapolitik*, "Zeitschrift für Umweltrecht" 2019, 1, pp. 18, 23.

<sup>34</sup> See J. Ciechanowicz-McLean, *Problemy prawne...*, p. 111. Gas absorption was included in the Paris Protocol.

outside Europe, especially in developing countries, it was received “with applause”, coming from the satisfaction of not participating in it.<sup>35</sup>

The Paris Agreement is based on different objectives, formulating the concept of “a transparent and dynamic legally binding agreement, containing fair and ambitious commitments from all Parties based on evolving global economic and geopolitical circumstances.”<sup>36</sup> It proves that the regulative paradigm changed: the place of individualised obligations, constructed with a small number of highly developed states in mind, is taken by duties addressed to the entire international community, referring to the sense of duty and responsibility for the common good. Although it is too early to determine the success of the Agreement, one places trust in it that a platform for co-operation will be constructed that will be more efficient than the one based on the Kyoto Protocol because it will be open for the co-operation of social partners, regardless of the attitude adopted by the local governments.<sup>37</sup>

The determinations which constitute the content of the Agreement are extensive and a full discussion of them exceeds the scope of this paper. Here, it should only be reminded that the basic long-term objective of the action was covered in Article 2 paragraph 1 of the Agreement. It provides for:

- a) holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C,
- b) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production, and
- c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

It is essential that a strict definition of the emission reduction obligations of individual states (which was included in the Kyoto Protocol in reference to developed states) was abandoned in the Agreement in favour of establishing these duties independently at the national level, communicating it to the parties to the Climate Convention, and recording the content of their commitments in a public registry maintained by the Secretariat.<sup>38</sup> The countries are to account for so-called

<sup>35</sup> See Ch. Streck, *op. cit.*, p. 22 ff.

<sup>36</sup> As stated in the Communication of the EC of 25 February 2015 “The Paris Protocol Plan to Combat Climate Change”, addressed to the European Parliament and the Council, preceding the adoption of the protocol; COM(2015) 81 final.

<sup>37</sup> See Ch. Streck, *op. cit.*, p. 13 ff.

<sup>38</sup> Such reporting-informing duties are to strengthen “the informal monitoring” of national activities and enabling putting pressure by the international community. See Ch. Streck, *op. cit.*, p. 20.

nationally determined contributions<sup>39</sup> every five years (Article 4 paragraphs 2, 8 and 9). Moreover, a gradual increase in the emission reduction target is provided for (the progressivity principle), in a manner that reflects the “highest possible ambition” (Article 4 paragraph 3).<sup>40</sup> The emission reductions declared by the states may also be changed at any time for the purpose of “enhancing [their] level of ambition” (Article 4 paragraph 11).

The Agreement adopts the principle of joint, but diversified responsibility which takes national circumstances into account. This relativisation of expectations is a sign of reason for some and a sign of weakness for others. On the one hand, it is critically noted that the obligations covered in the Agreement generally lack “a practical and instrumental concretisation,”<sup>41</sup> which is underlain by conflicts of interests which are difficult to overcome. The decisive issue of finding the just key for the division of global commitments in essence remained unsolved.<sup>42</sup> As a result, the Agreement gets a “hybrid” structure of responsibility: it is primarily a political programme which relates to the sense of duty of the states acting in the common interest of humankind, and it is a kind of “political narrative” which goes beyond the exclusively linguistic layer of provisions, which requires decentralised political, legal and social discourse.<sup>43</sup>

On the other hand, a manifestation of political wisdom, coming from the sober analysis of the Kyoto Protocol can be seen here. Voluntariness and flexibility accentuated in the Agreement become its advantages, as they allow for reducing social conflicts regarding climate protection.<sup>44</sup> In Ch. Streck’s opinion, it is admittedly difficult to question the responsibility of the state, which is of key importance in the end, however, the author emphasises the meaning of the transnational nature

<sup>39</sup> Also called “national contributions” (*Intended Nationally Determined Contributions – INDC*). J. Ciechanowicz-McLean, *Problemy prawne...*, p. 117.

<sup>40</sup> The need for progression is confirmed by the conservative proposals submitted in 2015 by the greatest world economies (also by the EU), during the ratification process (188 contributions) which do not provide for reaching the basic goal of lowering the global average temperature to below 2 °C.

<sup>41</sup> This would primarily be the announcement of complete withdrawal from coal as an energy fuel. After all, this is still the main message of the Agreement. See C. Franzius, *Das Paris – Abkommen zum Klimaschutz. Auf dem Wege zum transnationalen Klimaschutzrecht?* “*Zeitschrift für Umweltrecht*” 2017, 10, p. 518. See also K.F. Gärditz, *Zum transnationalen Mehrwert eines nationalen Kohleausstieges im Klimaschutzrecht*, “*Zeitschrift für Umweltrecht*” 2018, 12, p. 664 and references.

<sup>42</sup> See Ch. Streck, *op. cit.*, p. 18 ff.

<sup>43</sup> The views presented by K.F. Gärditz, *op. cit.*, can be interpreted in such a way.

<sup>44</sup> Nobel Prize American laureate Elinor Ostrom’s works devoted to the analysis of administering common goods are what underlies such expectations for Ch. Streck. See Ch. Streck, *op. cit.*, p. 13 and references.

of the Agreement, and the role played by social and market (private-legal) partners in the dialogue in the realisation of the Agreement. She states that this way, the Paris Agreement received a guarantee of independent existence and “secured itself” in case the governments withdrew their support,<sup>45</sup> though this seems to be an unduly optimistic prognosis. It is similar in the case of a belief in the governments’ sense of responsibility, a belief which is based on the assumption that “motivation is everything and force is nothing.”<sup>46</sup>

What is key for the understanding of the legal specificity of the Paris Agreement is the transnationality mentioned above. Admittedly, it is an interstate agreement and its provisions do not indicate the role of the social (private) actors of the climate dialogue directly, nevertheless, achieving the declared objectives will not be possible without their involvement. This results from the basic fact that the source of all problems is the legitimate actions of entities which are autonomous from the state. This transnationality does not describe a separate area or layer of the law, but the process of transforming the internal law and the international law, which leads to the socialisation of the two.<sup>47</sup>

The peculiarities of the Paris Agreement presents a question about its legal nature: is it a hard law or soft law? Formally, it is undoubted that it is an act of the international law with the status of a treaty (convention). This is indicated by Article 21 paragraph 1 (determining the conditions of the entry into force of the Agreement), Article 26 (indicating the Secretary-General of the United Nations as the Depositary of the Agreement), Article 27 (formulating a clause of the inadmissibility of reservations) and Article 28 (providing for a procedure of withdrawing from the Agreement).<sup>48</sup> On the other hand, determining the legal nature of the document as a whole does not say much about the legal nature of individual treaty obligations. In D. Nüchel’s opinion, the analysis of this issue should be focused on three aspects: holding the increase in the global average temperature (Article 2 paragraph 1 letter a), increasing the ability to adapt to the adverse impacts of climate change (Article 2 paragraph 1 letter b) and averting damage (Article 8). He concludes that the Agreement does not construct typical, unambiguous obligations, situating itself “at some close proximity” to the soft law. Some of these obligations are covered

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<sup>45</sup> Ibidem, p. 22 ff.

<sup>46</sup> Ibidem.

<sup>47</sup> C. Franzius, op. cit., p. 516 and references.

<sup>48</sup> D. Nüchel, *Rechtlicher Charakter des Pariser Übereinkommens – hard law oder soft law?*, “Zeitschrift für Umweltrecht” 2017, 10, p. 525 ff.

primarily in the procedural context, forming a framework for further activities, which relativises their meaning and introduces an element of uncertainty.<sup>49</sup>

It should be noted that with these fundamental features of the Paris Agreement, i.e. transnationality, flexibility and conciliation, the ways of reforming the climate and energy policy in the EU are basically convergent.

### The Climate Strategy of the EU

The aforementioned legislative package “Clean Energy For All Europeans” establishes the framework for the strategy of implementing the Paris Agreement in the European Union and the member states. It covers extensive and substantially interconnected legal acts which constitute a complex normative structure. Paramount integrating functions may be attributed to some of them, whereas sector issues which are narrowed in terms of their topics dominate in others. As a result, the legal substructure of the climate strategy of the EU is impossible to reduce to a set of several principles and measures which are already known because it uses a whole conglomerate of specialised solutions, changed, adapted or only just created for its purpose. The norms concerning objectives are addressed to not only the member states, but also to the participants of economic relations, who are grouped into transnational branches and sectors.

A legislative keystone for the extensive normative solutions is Regulation (EU) 2018/1999 of the EP and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.<sup>50</sup> It provides for the synchronisation of the decision-making processes within the Energy Union with the reporting obligations provided for by the Paris Agreement, binding the European energy and climate policy with international agreements.<sup>51</sup> In the pragmatic aspect, it constitutes a reaction to the lack of significant competences of the EU with regard to the energy policy and makes an attempt to compensate these limitations by using planning and procedural instruments, connected with monitoring and reporting.<sup>52</sup> The fact that these non-imperative settlements were recorded in the form of the directly applicable secondary law is not surprising because it corresponds to the earlier legislative practice, serving so-called soft governance.<sup>53</sup>

<sup>49</sup> Ibidem, p. 531 and references.

<sup>50</sup> See note 20.

<sup>51</sup> S. Schlacke, M. Knodt, *Das Governance-System für die Europäische Energieunion und für den Klimaschutz*, “Zeitschrift für Umweltrecht” 2019, 7–8, p. 408.

<sup>52</sup> F. Pause, op. cit., p. 389.

<sup>53</sup> See S. Schlacke, M. Knodt, op. cit., pp. 405, 408.

It should be reminded that the competences of the EU with regard to the energy market, provided for the first time in Article 194 of the Treaty on the Functioning of the European Union (hereinafter referred to as the TFEU) were significantly weakened by the reservation resulting from paragraph 2 of subsection 2 of that Article. It provides for the fact that the measures leading to achieving the objectives indicated in paragraph 1 (especially those promoting energy efficiency and energy saving and the development of new and renewable forms of energy), established by the European Parliament and the Council, shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. These limitations cannot be overcome by using the competences provided related to the environmental protection, provided for in Article 192(2)(c) of the TFEU because this Article requires consensus in the Council of the EU with regard to projects which may significantly limit the rights of the states to decide on the sources of energy used and on the manner of distributing it.<sup>54</sup>

As a result, the member states retain a wide margin of discretion when it comes to determining preferences for the sources of consumed energy in the framework of the so-called energy mix. Taking this into consideration, it currently does not seem possible to reach an agreement in the Union as to the common abandonment of coal as a fuel, and as to the restoration of the prescribed national objectives aimed at reducing the emission of greenhouse gases.<sup>55</sup>

The Regulation provides for two basic implementation instruments: a) a long-term strategy with a perspective of at least 30 years (Article 15) and b) integrated national energy and climate plans (Article 3). The provisions concerning the strategy are quite brief and cover obligations related to reporting. Furthermore, the general framework of the strategy was determined in Annex IV.

The provisions devoted to the integrated energy and climate plans are more extensive. Their first draft should have been presented to the EC by the end of 2018 and approved by the end of 2019. The content of the plan is explained in Annex I which focuses one's attention on five dimensions: decarbonisation (the issue of economy decarbonisation is included in it), energy efficiency, energy security, the internal energy market, and research, innovation and competitiveness. The Regulation does not refer to the issue of the form and procedure of hoisting the plans in the national legal order.

If it turned out that the sum of the undertakings of the individual member states is not enough to achieve the targets adopted by the EU, the Commission may only

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<sup>54</sup> Ibidem, pp. 404 ff.

<sup>55</sup> Ibidem, pp. 404, 408 i n.

formulate non-binding recommendations addressed to the member states. Two articles of the Regulation have been dedicated to this issue: Article 31 (entitled “Response to insufficient ambition of integrated national energy and climate plans”) and Article 32 (“Response to insufficient progress towards the Union’s energy and climate objectives and targets”).<sup>56</sup> What might turn out to be support for “soft governance” is financial incentives (based on the connections of the climate policy with the structural and investment policy), however, this aspect was omitted in the Regulation.<sup>57</sup>

In Poland the draft of “The National Plan for Energy and Climate 2021–2030” was prepared in the Ministry of Energy, and its final version is to be approved after considering the conclusions drawn from inter-ministerial consultations, public consultations, updates to the national sector strategies, as well as regional consultations and European Commission’s Recommendations published on 18 June 2019.<sup>58</sup>

The evaluation of the existing proposals from the member states, submitted to the EC, was undertaken by one of the European non-governmental organisations.<sup>59</sup> Its results are disappointing, as even the highest-rated projects barely passed the threshold of 50% of the maximum grade.<sup>60</sup> The Polish proposal found itself in the fourth, lowest-rated group, with the result of 17.9%. The fact that the German project and the Slovak one were classified lower (12.5%) is of little comfort.<sup>61</sup>

One should further indicate the sector solutions of the legislative package “Clean Energy For All Europeans”, which serve reducing greenhouse gases emission. They were associated with selected areas of business activity and peculiar legal solutions, based on separate terms, were developed for them.<sup>62</sup>

<sup>56</sup> Ibidem, pp. 406–408.

<sup>57</sup> Ibidem, p. 410.

<sup>58</sup> Project “National Plan for Energy and Climate 2021–2030. Objectives and Targets and Policies and Actions” (“Krajowy plan na rzecz energii i klimatu na lata 2021–2030. Założenia i cele oraz polityki i działania”), marked as v. 3.1. of April 2019, is available at: <https://www.gov.pl/web/energia/projekt-krajowego-planu-na-rzecz-energii-i-klimatu-na-lata-2021-2030>

<sup>59</sup> See [https://www.ecologic.eu/sites/files/publication/2019/2149-necp-assessment-ecologic-institute-climat\\_20190516.pdf](https://www.ecologic.eu/sites/files/publication/2019/2149-necp-assessment-ecologic-institute-climat_20190516.pdf) (access: 25.05.2019). See also S. Schlacke, M. Knodt, op. cit., p. 408.

<sup>60</sup> The Spanish project received 52.4%, the French one received 46.9%, and the Greek one received 44.2% of the maximum grade. The climate plan of Slovakia is the last on the list (3.2%).

<sup>61</sup> However, it should be considered that the initial German proposal did not include the decisions made by the federal government on 20 September 2019, providing for i.a. withdrawal from using coal as an energy fuel. See G. Łazarczyk, *Andrzej Duda chce przemawiać na szczycie klimatycznym w Nowym Jorku, ale jego wystąpienia nikt nie przewiduje*, <http://wyborcza.pl/7,155287,25225299,andrzej-duda-chce-przemawiac-na-szczycie-klimatycznym-w-nowym.html> (access: 23.10.2019).

<sup>62</sup> Ch. Kreuter-Kirchhof, op. cit., p. 397 ff.

The first sector covers key industrial installations, including the ones using the energy combustion of fuels (there are ca. 11,000 of them in the EU), and also the European aviation industry (520 airlines).<sup>63</sup> In 2016, this sector was responsible for 40% of the emission of greenhouse gases in the EU. It was covered by the uniform intra-EU emission trading system which should contribute to decarbonisation by 21% in 2020 and by 43% in 2030 (in relation to basic 2005). Its functioning is based on the provisions of Directive 2009/29/EC of the EP and the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community. Further changes were introduced by the provisions of the newest Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814.

Requirements for the buildings sector, the sector of other types of transport and farm waste (the so-called non-ETS sector) which (at least in Poland) is responsible for half of the greenhouse gas emission, have been regulated separately. The collective target for the entire EU provides for the reduction of emission from such sources by at least 30% in relation to 2005. In this case, these expectations were divided into the member states, reaching consensus provided for in Article 192(2)(c) of the TFEU. This was done by means of the provisions of Regulation (EU) 2018/842 of the EP and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013.<sup>64</sup> Details have been set out in Article 4(1) and Annex I to the Regulation. According to it, Poland should reduce such emissions by 7%. Such actions are to be supported by undertakings provided for in the provisions of:

- a) Directive (EU) 2018/2001 of the EP and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources<sup>65</sup> and
- b) Directive (EU) 2018/844 of the EP and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, and Directive (EU) 2018/2002 of the EP and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency.<sup>66</sup>

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<sup>63</sup> Ibidem.

<sup>64</sup> Official Journal of the EU 2018 L 156, p. 26.

<sup>65</sup> See note 18.

<sup>66</sup> See note 17.

The third sector includes land use, land use change and forestry (abbreviated as LULUCF). Emissions coming from it should be fully compensated by parallel actions which ensure the absorption of greenhouse gases (the “no-debit” principle). These issues have been regulated in Regulation (EU) 2018/841 of the EP and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU.<sup>67</sup>

Regulations connected with the first sector have a special meaning for the issue of the coal energy industry discussed in this paper. They determine the rules of the functioning of the intra-EU emission trading system. It was created by the provisions of Directive 2003/87/EC in order to support reducing the emission of greenhouse gases in a manner that would be effective in terms of economy and costs, and the idea behind it refers to the settlements of the Kyoto Protocol. It uses the auction mechanism in which the price for the rights to emission is shaped by supply and demand.<sup>68</sup> In few cases, the permissions are granted free of charge, especially if there is a risk of so-called carbon leakage. Such situations were described in Article 10b (currently in wording established by the provisions of Directive (EU) 2018/410.<sup>69</sup> Free permissions to modernise the energy sector, which these member states which the 2013 GDP per inhabitant in euros, according to market prices, was below 60% of the EU average (Article 10c), are also exceptional. Finally, it should be mentioned that a gradual reduction in the number of permissions granted was provided for. The reduction rate was initially set at 1.74%, and starting from 2021, it will amount to 2.2% (point 5 of the preamble to Directive (EU) 2018/410).

This system is subject to corrections considering market experience gained in subsequent settlement periods. The first period covered the years 2005–2007, the second covered 2008–2012, and the third covered 2013–2020. In March 2018, the EP and the Council made a decision to extend it to 2021–2030, despite no significant success. First of all, it should be indicated that at the threshold of the third period, there was a significant surplus of emission allowances, estimated at 2 billion certificates, which translated into their low prices (ca. 3 euros). This led to an increase

<sup>67</sup> Official Journal of the EU 2018 L 156, p. 1.

<sup>68</sup> Its detailed discussion exceeds the scope of this paper. For information on the development of national regulations, see M. Górski, *Handel uprawnieniami do emisji gazów cieplarnianych i innych substancji w świetle ustawy z 22 grudnia 2004 r.*, [in:] J. Boć, K. Nowacki (eds.), *Prawna ochrona powietrza i handel uprawnieniami emisyjnymi w Polsce i w Niemczech*, Wrocław 2006, p. 173 ff.; P. Czembor, *Backloading – zmiana zasad aukcji uprawnień do emisji*, *Przegląd Prawa Ochrony Środowiska* 2013, 3, p. 93 ff.; Ł. Baran, T. Skoczkowski, S. Bielecki, A. Węglarz, *Aukcyjne quo vadis dla odnawialnych źródeł energii*, *Energetyka* 2017, 9, p. 590 ff.

<sup>69</sup> Ch. Kreuter-Kirchhof, op. cit., p. 399.

in the generation of energy in plants combusting coal (and it was significant, e.g. in Germany).<sup>70</sup> For this reason, the EP and the Council initiated reforms aimed at reducing the number of permissions. As a result of these actions, the prices rose to 22.00 euros at the beginning, and to 23.37 euros at the end of 2018. What is expected is a consolidation of these tendencies and as a result, creating effective incentives to reduce the emission of greenhouse gases.<sup>71</sup> There are views expressed that the prices of the permissions should still rise to at least 40 euros, and even USD 100 per ton of CO<sub>2</sub> (as estimated by the High-Level Commission on Carbon Prices).<sup>72</sup> The French proposal to set the minimum price at 30.00 euros was, however, not adopted.<sup>73</sup>

Significant and permanent reductions may only be ensured by a complete withdrawal from the coal energy industry, assuming that the previously granted permissions will not be put on sale because this would only moving emission between entities within the system. A permanent effect will only be brought by their annulment. This topic is accentuated by point 9 of the preamble to Directive (EU) 2018/410 and Article 12(4), amended by the provisions of the Directive.<sup>74</sup>

## The Meaning of the Provisions of the European Water Law for the Future of Coal Plants

Plant water and sewage management is essential for the proper functioning of a conventional coal plant. On the one hand, access to water is a condition of the proper functioning of power units because they require cooling. On the other hand, exploiting energy installations forming a complex technological string leads to the creation of various kinds of sewage which is disposed of into the environment. Some of them are highly polluted with chemical compounds, especially sewage from wet flue gas desulphurisation plants. They are characterised by a significant amount of chlorides and sulphates, suspensions, a high load of organics, as well as the presence of heavy metals, including mercury.<sup>75</sup>

<sup>70</sup> C. Ziehm, *Klimaschutz im Mehrebenensystem – Kyoto, Paris, europäischer Emissionshandel und nationale CO<sub>2</sub>-Grenzwerte*, "Zeitschrift für Umweltrecht" 2018, 6, p. 342.

<sup>71</sup> Ch. Kreueter-Kirchhof, op. cit., p. 399.

<sup>72</sup> C. Ziehm, op. cit., p. 342.

<sup>73</sup> Ibidem, p. 343.

<sup>74</sup> Ch. Kreueter-Kirchhof, op. cit., p. 399.

<sup>75</sup> A. Litwinowicz, *Gospodarka wodno-ściekowa elektrowni – rys historyczny i aktualne problemy eksploatacyjne*, "Energetyka" 2017, 9, pp. 564, 568; see also E. Janigacz, *Ścieki z energetyki – rzeczywisty problem czy fikcja?*, "Energetyka" 2019, 5, p. 354 ff.

The issue of protecting waters against chemical pollution is reflected in the European law, primarily thanks to the provisions of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy<sup>76</sup> and executive acts. The extensive protective regulations of the act serve achieving environmental goals which form an aggregated, multi-storied structure of requirements which are established in a slightly different manner for surface waters and underground waters (in the group of the former, natural waters are distinguished, though this term does not appear directly, and so are artificial waters and heavily modified waters).<sup>77</sup> A common prime goal for both the former and the latter is averting the existing state of the waters and receiving a state determined as good. Environmental objectives referring to the surface waters are determined by their ecological state or potential and chemical status. What is key for the underground waters is their quantitative status and chemical status.

A reason for the European and national legislator's particular concern is risks caused by chemicals deemed as dangerous, directly or indirectly introduced into the waters as a result of human activity. They influence the chemical status of the waters and it is most frequently they that prejudice the final evaluation of a specific "body of water", which is the smallest spatial object of the rationing. In reference to the surface waters, an additional objective is obligatory for the member states, which is connected with a special group of chemicals, that is, with priority substances. Under Article 16 paragraphs 1 and 8 of the Directive, the states should undertake necessary actions for the purpose of "gradually reducing pollution from priority substances; and stopping or phasing out emissions, discharges and losses of priority hazardous substances."

Mercury is also one of the priority hazardous substances. Legal controversies, which lead to claims about no legal grounds for granting new permissions to dispose of sewage including mercury to the water, and consequently also lead to claims about the necessity of stopping the energy combustion of coal completely from 2028, are primarily related to mercury.

It should be explained that this issue absorbs the attention of legal science primarily in Germany, whereas in other countries (also in Poland) and at the Union

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<sup>76</sup> See note 25.

<sup>77</sup> Ordinance of the Minister of Environment of 21 July 2016 Regarding the Manner of Classifying the State of Surface Water Bodies, and the Environmental Quality Standards for Priority Substances (Journal of Laws, item 1187) and Ordinance of the Minister of Environment of 21 December 2015 Regarding the Criteria and Manner of Evaluating the State of Underground Water Bodies (Journal of Laws 2016, item 85).

level, it is basically not identified.<sup>78</sup> Views presented in the German literature are, however, polarised.

On the one hand, there is a group of prominent lawyers<sup>79</sup> who pose a thesis about the necessity, resulting from the European provisions, of the gradual phasing out of the emission of sewage including mercury until it is completely eliminated, starting from 2028. Views which negate such conclusions are also presented. An expression of them became, among other things, an opinion prepared by W. Durner and N. Trillmich for a society representing the producers of lignite.<sup>80</sup>

Arguments for the thesis about the binding duty for the member states to eliminate discharges, emissions and losses of priority hazardous substances are derived from three solutions of the Framework Water Directive. Firstly, this is about the obligation to prevent the worsening of the existing state of waters, which results from Article 4(1)(a)(i). Secondly, this is about the order to achieve a good state of the waters (Article 4(1)(a)(ii and iii)). Thirdly, this is about the aforementioned requirement of the progressive reduction of pollution from priority substances, complemented by another objective – aiming at stopping or gradually eliminating emissions, discharges and losses of priority hazardous substances. Moreover, this argument is attributed with a decisive meaning.<sup>81</sup> In order to achieve this goal, the Commission should submit suitable proposals within two years from including a given substance on the list of priority substances. These proposals are meant to cover at least limiting emissions from point sources and the environmental quality standards. According to Article 16(6) of the Framework Directive, the proposed changes referring to the priority hazardous substances should also include a timetable, providing for complete elimination of those substances within the period not exceeding 20 years, calculated from the day of adopting those proposals by the European Parliament and the Council (so-called phasing-out).

The first list of such substances comes from 20 November 2001, nevertheless, the first applicable project was created only in July 2006, which opened the way

<sup>78</sup> W. Durner, N. Trillmich, *Ausstieg aus der Kohlennutzung kraft europäischen Wasserrechts?*, "Deutsches Verwaltungsblatt" 2011, 9, p. 519.

<sup>79</sup> Such opinions were presented in the form of papers (in particular: S.R. Laskowski, *Kohlenwerke im Lichte der EU-Wasserrahmenrichtlinie*, "Zeitschrift für Umweltrecht" 2013, 3, p. 131 ff.; M. Schulte, J. Kloos, *Europäisches Umweltrecht und das Ende der Kohlenwerksnutzung – Zur unmittelbaren Wirkung des Phasing-Out-Ziels aus Art. 4 Abs. 1a) iv) WRRL im deutschen Recht*, "Deutsches Verwaltungsblatt" 2015, 16, p. 997 ff.; H. Ginzky, *Die Pflicht zur Minderung von Schadstoffeinträgen in Oberflächengewässer*, "Zeitschrift für Umweltrecht" 2009, 5, p. 242), though a monograph was created, too: A. Pieper, *Die Beachtung der wasserrechtlichen Phasing-Out-Verpflichtung im Anlagengenehmigungsrecht*, Baden-Baden 2014.

<sup>80</sup> The publication provided in note 78 is based on this opinion.

<sup>81</sup> S.R. Laskowski, op. cit., p. 132 ff.

to passing Directive 2008/105/EC on environmental quality standards in the field of water policy on 16 December 2008. The thing is that it only determined the quality standards for surface waters, whereas it does not include any settlements regarding measures of limiting emissions or regarding undertakings serving the achievement of the complete elimination of the priority hazardous substances in 20 years. In essence, the dispute is about the fact whether, despite the European legislator's (alleged) omissions, this obligation produces any legal effects, and about what these effects are. There are considerations, among other things, whether this obligation was not passed on the member states. Arguments which serve negating such theses are noticed in the EC's announcements which are present particularly in the justification of the draft Directive 2008/105/EC. This is because they prove the clear lack of political willingness to establish an absolute prohibition on introducing mercury in industrial sewage at the European level.<sup>82</sup> The newest confirmation of such an interpretation is the permitted emission levels, associated with the BAT, established at 0.2–3 µg/l for mercury, provided for in Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for large combustion plants.<sup>83</sup> Specifically speaking, this is about BAT 15, Table I (which is discussed below).

It should be added that a similar legal problem connected with mercury is revealed Poland on the grounds of the Act of 20 July 2017 – the Water Law.<sup>84</sup> This is about an absolute prohibition on introducing sewage including priority substances into waters, which is included in Article 78. Under point 1 letter b) of the said Article, sewage may not include “priority substances specified in provisions issued on the basis of Article 114.” The official list of such substances includes mercury.<sup>85</sup> Article 78 is based on the former Article 41 of the Act – the Water from 2001, with this crucial difference that in the case of point 1 letter b), the whole class of priority substances was inserted there without thinking in place of the previously specified substances (known as DDT, PCB, PCT, HCH),<sup>86</sup> despite the fact that the European provisions do not require such rigour.

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<sup>82</sup> W. Durner, N. Trillmich, *op. cit.*, p. 523 ff.

<sup>83</sup> Official Journal of the EU L 212, p. 26.

<sup>84</sup> Consolidated text of 2018 item 2268, of 2019 item 125, 534, 1495.

<sup>85</sup> Annex to the Ordinance of the Minister of Marine Economy and Inland Navigation of 1 March 2019 Regarding the List of Priority Substances, Journal of Laws, item 528 – No. 21 “mercury and its compounds”.

<sup>86</sup> This regulation should be seen through provisions specifying substances, in the case of which production, application, and introduction into the market is forbidden in Poland. This is about Article 160 of the Act – Environmental Law and the based thereupon Ordinance of the Minister

Next to the regulations devoted to the priority substances, the Act also includes provisions concerning substances particularly harmful to the water environment. The executive acts determining the permitted emission standards have been associated with them (and not with the priority substances). What is important, the lists which cover substances from both groups overlap to a great extent. This also concerns mercury which is a priority hazardous substance that is covered by a statutory ban on introducing it into water, not ceasing to be a substance which is particularly harmful to the water environment at the same time, with an established permitted emission standard determined in the provisions of the regulation.<sup>87</sup> This shows that there is no coherence in the provisions of the Polish Water Law, serving the implementation of the terms of the European water protection policy.<sup>88</sup>

## The Meaning of Directive 2010/75/EU on industrial emissions

What is also essential for the future of conventional coal plants is the European provisions referring to integrated pollution prevention and control which cover ca. 52,000 European industrial installations, including those which serve the energy combustion of fossil fuels with the total fuel power amounting to 50 MW or more. The concept of the integrated pollution prevention was introduced for the first time by the provisions of Directive 96/61/EC of 24 September 1996 which received its consolidated version in 2008,<sup>89</sup> following a number of significant changes. The indicator of this concept is the idea of an integrated permit, including the need for

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of Environment of 9 December 2003 Regarding Substances Constituting a Special Danger to the Environment (Journal of Laws No. 217, item 2141). See note 3 to Table I in Annex 4 to the Ordinance. See Commentary of M. Górski to Article 160, [in:] M. Górski, M. Pchalek, W. Radecki, J. Jerzmański, M. Bar, S. Urban, J. Jendrośka, *Prawo ochrony środowiska. Komentarz*, Warszawa 2011, p. 667 ff.

<sup>87</sup> Ordinance of the Minister of Marine Economy and Inland Navigation of 12 July 2019 on Substances Particularly Harmful to the Water Environment and on the Conditions of Introducing Sewage into Water or Ground, and Disposing of Rainwater and Snowmelt into Water and Water Machines (Journal of Laws item 1311). This is about Annex 4 "The Highest Permitted Limits of Polluting Substances for Industrial Sewage", and specifically, its Table 1 "The Highest Permitted Limits of Substances Particularly Harmful to the Water Environment", determining such values also for mercury (No. 1). The table also includes several substances whose introduction is consequently prohibited (i.a. such as DDT, PCB, PCT), whose emission standard is consequently 0.

<sup>88</sup> I discuss this issue in more detail in the paper: *Problem zanieczyszczenia wód śródlądowych substancjami chemicznymi w świetle prawa europejskiego oraz prawa krajowego – uwagi krytyczne*, "Studia Prawnicze" 2018, 4, p. 110 ff.

<sup>89</sup> Dyrektywa PE i Rady 2008/1/WE z 15.01.2008 r. dotycząca zintegrowanego zapobiegania zanieczyszczeniom i ich kontroli, Official Journal of the EU L 24, p. 8.

protecting the environment as a whole, making use of the limits of permitted emission, determined by reference to the Best Available Techniques (BAT) requirements.<sup>90</sup>

However, many years of practice proved that using the criterion of the best available techniques involves many difficulties, the source of which also includes unclear provisions. For this reason, the European legislator reinforced a general reform of them by adopting Directive 2010/75/EU of the EP and of the Council of 24 November 2010 on industrial emissions,<sup>91</sup> which also introduced a number of changes in several other directives. The new regulations serve the protection of the environment as a whole, prevent the movement of pollution from some elements of the environment to the other, reinforce seeking the energy efficiency, and prevent accidents. They contribute to the achievement of identical terms of carrying out business activity in the Union by harmonising the requirements of the environmental efficiency of industrial installations.

In 2010, the concept of the best available techniques was strengthened institutionally and procedurally.<sup>92</sup> The provisions of Directive 2008/1/EC from 2008 only generally discussed exchanging information on the limits established for individual categories of business activity, pursuant to Annex I, organised by the Commission, including the publication of a report (Article 17), but the legal status of such a document was not established. In turn, Directive 2010/75/EU included not only the definition of the BAT reference document (Article 3 point 11), but practical guidelines organising the work of the forum of the representatives of the member states, industries concerned, and non-governmental organisations promoting the protection of the environment were also specified in Article 13. The key element of the reference document constitutes “the BAT conclusions” (defined separately in Article 3 point 12), adopted in the form of an implementing decision, on the basis of the principles specified in the Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (Article 75(2) of the Directive). Such a solution has this practical effect that the conclusions have to be translated into all official languages of the EU, which overcomes difficulties in the propagation of these conclusion.<sup>93</sup> Simultaneously, they become more legally binding, and using them becomes obligatory. While the application of the best available techniques was only one of the legally permitted choices before (signalled by the expression “in particular”), fulfilling the obligations of the

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<sup>90</sup> For instance, see M. Górski et al., *op. cit.*, p. 814 ff. and references.

<sup>91</sup> Official Journal of the EU L 334, p. 17.

<sup>92</sup> A. Diehl, *Stärkung des europäischen Konzepts der “besten verfügbaren Techniken” durch die Richtlinie über Industrieemissionen?*, “Zeitschrift für Umweltrecht” 2011, 2, p. 59 ff.

<sup>93</sup> *Ibidem*, p. 61.

installation operator (Article 3(1)(a)), nowadays, the duty of using the best available techniques is unconditional as a rule (Article 11(a)).<sup>94</sup>

The obligation, provided for in Article 21(3), to verify of the granted integrated permits in four years from the publication of the decision regarding the BAT conclusions, whether the conditions of a permit for a given installation are compatible with the Directive, is also a manifestation of the legal significance of the BAT conclusions. Changing these permits may be a result of such a control. The responsible authorities may, however, establish less strict permissible emission limits in special situations if the achievement of the emission levels associated with the best available techniques described in the BAT conclusions led to disproportionately high costs in relation to benefits for the environment, due to (a) the geographical location of a given installation or local environmental conditions or (b) the technical characteristic of a given installation. The permitted emission limits established on such terms, however, cannot exceed the permitted emission limits established directly in Annexes to the Directive, and they cannot cause significant pollution, and at the same time, they must guarantee the achievement of a high level of the protection of the environment as a whole (Article 15(4)).<sup>95</sup>

The Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions for large combustion plants has already been discussed. In Poland, it was, however, severely criticised by energy producers, but it was warmly received by non-governmental organisations. The representatives of the industry raised that significantly restricting the requirements, particularly those related to the limits of dust, sulphur dioxide, and nitrogen oxides, is not justified technologically (though it refers to best the best available techniques used in the USA) and may pose a threat to the safety of the provisions of electricity. Apart from that, it may force expensive modernising investments, estimated at ca. PLN 10 billion, which will have to be realised in 4 years. In this regard, the government of the Republic of Poland decided to file an action in the Court of Justice of the European Union for annulment of Decision on the BAT conclusions pursuant to Article 263 of the TFEU.<sup>96</sup> The action prepared in the Ministry of Environment

<sup>94</sup> The relativising meaning is also attributed to references (included in Article 2 point 12) to Annex IV determining the circumstances to be considered, in general or in special situations, while establishing the best available techniques. The last position includes information published by international organisations, which is interpreted as a reference to ISO norms. *Ibidem*, p. 61 ff.

<sup>95</sup> D. Janigacz, A. Nitarska-Fink, B. Wartak, *Zmiany pozwoleń zintegrowanych – wybrane problemy i wątpliwości*, "Energetyka" 2019, 5, p. 346 ff.

<sup>96</sup> B. Sawicki, *Polska skarży do Luksemburga regulacje uderzające w węgiel*, <https://biznesalert.pl/bat-polska-europa-polityka-klimatyczna-trybunal/> (access: 26.10.2017).

includes, next to the above-given substantive arguments,<sup>97</sup> an allegation of applying the wrong voting procedure on the adoption of the BAT conclusions. This is because Poland applied for voting in the Nice system, but the application was not accepted, and the vote was carried out in the Lisbon system. Besides, the European Commission introduced essential amendments to the draft BAT conclusions on the day of voting, without discussing them.<sup>98</sup>

## Conclusions

Poland is not and will not be first in the European family of states conducting the ecarbonisation of the economy. The prepared government documents with long-term perspectives, as well as political declarations indicate that the government of the Republic of Poland will not decide on spectacular withdrawal from the use of coal. It also cannot be obligated to do it against its own will because the treaty regulations give the member states the right to veto measures established by the European Parliament and the Council when these measures violate their right to determine the terms of using their own energy resources, the right to choose between various energy sources, and the general structure of energy supply.

The climate policy of the Polish government is conservative. In a sense, the Polish attitude resembles the Chinese scenario more than, for instance, the German scenario of modernising the energy sector for the purpose of achieving climate objectives because it is based on the strategy of extending the time of using coal for as long as possible. The future of the coal energetics seems prejudged, however, due to a braid of complex economic-legal circumstances. This is primarily about growing prices for permissions to emit greenhouse gases and the increasingly strict terms of introducing chemical pollutants into the environment. With time, they will lead to the fact that the energy combustion of coal will simply stop being profitable.

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<sup>97</sup> Also shared by the delegations of other member states – Germany, the Czech Republic, Bulgaria, Romania, Hungary, Slovakia, and Finland.

<sup>98</sup> *Polska przegrała spór o elektrownie. Może to nas kosztować 10 mld złotych*, <https://biznesalert.pl/polska-przegrala-spor-o-elektrownie-moze-nas-kosztowac-10-mld-zlotych/> (access: 28.04.2017); *Salek: Decyzja Unii zagrozi dostawom energii w Polsce*, <https://biznesalert.pl/salek-decyzja-unii-zagrozi-dostawom-energii-polsce/> (access: 28.04.2017).