

LEGAL ASPECTS OF ESG DEVELOPMENT IN THE FIELD OF POLAND'S RAW MATERIAL POLICY USING THE EXAMPLE OF THE GEOLOGICAL AND MINING SECTOR

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Abstract. The challenges connected with energy transformation, and in particular the raw materials policy, require due care for the functioning of the sector in question, in compliance with the applicable laws. The creation of an adequate set of legal instruments, including the ESG reporting obligation, will foster the responsible development of the raw materials security sector, which will also contribute to a sustainable regional development model. The article analyzes the raw materials policy within the sustainable regional development system and legal regulations governing ESG reporting.

Keywords: environmental governance; social governance; Poland; EU regulations

INTRODUCTION

The legal bases governing the ESG¹ (i.e., environmental, social and corporate governance) responsibility of business entities stem from the legal regulations of the European Union and national regulations in the Polish legal system. As part of the EU regulations, new requirements are to be introduced regarding sustainable development reporting, which will be implemented within the domestic legal system from 2024. The open-ended system of legal regulations regarding ESG enables an ongoing analysis of the proposed solutions, taking into consideration proposals prepared for high-risk sectors in terms of sustainable development, i.e., agriculture, coal mining, extraction, refinery, energy, land transport, automotive, and food sectors.² The choice of sectors within the raw materials policy domain is connected with the role they play in sustainable development and their functional specificity. Considering the above, the author has chosen to analyse the activities

¹ ESG – environmental, social governance.

² See https://www.pkobp.pl/media_files/c34091cf-a104-4b7e-a85f-0ac7875abd80.pdf [accessed: 16.10.2023].

within the extraction sector as an important energy transition area influencing sustainable development.

To date, legal aspects pertaining to the ESG reporting on sustainable development have not been the subject of any broader studies within the doctrine of legal sciences. When searching through the literature on the subject matter, one can find publications presenting this issue mainly from the perspective of economic sciences [Cicirko 2022; Zyznarska-Dworczak 2022; Ahmed, Muhammad, and Lee 2023]. The research conducted as part of this article includes, in the theoretical part, the analysis of legal regulations related to the national raw material policy and its impact on sustainable development. In the analytical part, the legal analysis covers regulations governing the obligation to introduce enterprise reporting on sustainable development. The purpose of the article is to analyse the legal mechanisms enabling the creation of a system of enterprise reporting on the activities implemented in the field of sustainable development, with a particular focus on the raw materials policy. The research hypothesis is the statement that legal regulations governing the implementation of the above system must be developed in consideration of the specificity of economy sectors, resulting from their strategic position in the economy system. In relation to the raw materials policy related to minerals, these regulations should be included in the *Geological and Mining Law*. The analysis of the proposed research domain will be conducted using the dogmatic legal method and – to a minor extent – the historical and comparative legal method.

1. RAW MATERIALS POLICY WITHIN THE SUSTAINABLE REGIONAL DEVELOPMENT SYSTEM

The legal aspects of ESG reporting in the field of sustainable development are currently subject to implementation within the EU law. This also requires specific legal regulations within the national legal system, in particular, in relation to the raw materials policy that is one of the key issues influencing the sustainable development system. The crucial element in the process of shaping the sustainable regional development system is the raw materials policy which is of utmost importance for the overall development of Polish economy.

The ESG concept comprises the environmental, social and corporate governance dimensions. The environmental and social dimensions previously functioned as the principle of corporate social responsibility (CSR), while the new component – referring to corporate governance – has mainly arisen from the need to introduce restrictive legal regulations on enterprise reporting on non-financial data [Misztal 2023, 92-93]. It is worth noting that the ESG issues may influence the long-term outcomes of enterprises,

and they should, therefore, be taken into consideration while making investment decisions [Cicirko 2022, 125]. It is indisputable, as regards the ESG analysis, that the instruments for its verification are insufficient. Further development-oriented measures are also required from the owner party, which should undoubtedly entail promoting the ESG culture across enterprises [Ahmed, Muhammad, and Lee 2023, 15-16]. Measures taken in the course of implementing the ESG principles to foster sustainable development are primarily focused on reducing carbon dioxide emissions by large enterprises [Baratta, Cimino, and Longo 2023, 15]. In consequence, the state's support in preparing the appropriate mechanisms to facilitate ESG implementation appears indispensable and may take the form, *inter alia*, of tax reductions or lower credit instalments [Jin and Hue 2023, 20]. The ESG concept has been rapidly developing for the past three years, given the extensive measures taken by Poland in the field of raw materials security or energy transformation. It is a concept that changes the face of Polish economy both rapidly and expansively, thus shaping the sustainable development process.

Poland's raw materials policy was defined in the Responsible Development Strategy³ as "a project for building an efficient and effective system for the management of all types of minerals and mineral raw materials along the entire value chain, and their resources held by Poland, including the adequate - i.e., related - legal and institutional changes. The raw materials policy also supports the transition into a circular economy."⁴ The action taken by the legislator to include the above definition in a strategic document demonstrates the process of integrating the raw materials policy into the sustainable regional development system [Szewczak 2022, 226].

Measures taken in connection with the implementation process of the national raw materials policy⁵ relate, to a large extent, to issues connected with ensuring the country's energy security through sustainable extraction of minerals, and with attempts to shape a circular economy. The principal objective of Poland's raw materials policy is "to ensure the country's raw materials security by guaranteeing access to the necessary raw materials both currently and in the long-term perspective, taking into consideration the changing needs of future generations."⁶ It is worth noting that, in view of the evolving legal regulations landscape, issues concerning the implementation of the national raw materials policy and those related to the system of sustainable development must co-exist to form an integrated system.

³ See "Monitor Polski" of 2017, item 260.

⁴ Ibid.

⁵ See "Monitor Polski" of 2022, item 371.

⁶ Ibid.

Activities in the field of minerals extraction from deposits are regulated by the provisions of the Geological and Mining Law.⁷ Interestingly, the lack of a legal definition of a mineral constitutes a sort of legal gap. The Geological and Mining Law only defines the concept of a deposit – as a natural accumulation of minerals, rocks, and other substances, the extraction of which may be economically profitable, and the concept of an extracted mineral – as the whole of the mineral separated from the deposit (Article 6(1)(3) and (19)). In addition, it stipulates that minerals do not include waters, except for brine, curative and thermal waters (Article 5(1)). The above concepts do not explain the criterion of economic profitability, the attainment of which often depends on the actual situation on the raw materials market [Wojtulek, Kocowski, and Małecki 2020, 52-53], or on issues related to the need to implement sustainable development policies. A certain solution is provided by legal aspects regulated by the amendment to the Geological and Mining Law, introducing, *inter alia*, the definition of a strategic deposit, which is understood as a mineral deposit which is subject to special legal protection due to its significance for the national economy or security.⁸ The introduction of the above definition by the legislator is likely to significantly simplify the implementation of tasks in the field of raw materials policy which will, at the same time, translate into the implementation of this policy within the sustainable development system.

It should be noted that the national raw materials policy defines specific objectives relating to the development of the geological and mining sector. First, a significant objective is to take measures for the protection of minerals, *inter alia*, through an appropriate planning and spatial development process. Second, it is important to support the development of a circular economy. Third, the process related to the dissemination of knowledge in the field of geology and mining is part of the overall environmental education shaping the principles of sustainable regional development [Szewczak 2022, 231-35]. In Poland, the geological and mining sector is important in view of the need to carry out the energy transition process.

The raw materials policy in Poland plays a crucial role in the process of creating a system of sustainable regional development. The characteristic feature of the sustainable regional development model is “responsible development, ensuring the participation of and benefits for all social groups, based on multi-dimensional social and cross-generation solidarity, connecting urban and rural areas” [Szewczak and Szewczak 2020, 189]. The development of that model must be based precisely on the implementation of the mandatory legal requirements for action in the field of sustainable

⁷ Act of 9 June 2011, the Geological and Mining Law, Journal of Laws of 2023, item 633.

⁸ Journal of Laws of 2023, item 2029.

development. The concept of sustainable development should be based on “four intrinsically linked elements: society, natural resources, cultural resources and ethics” [Sałek 2022, 21]. When formulated in this way, the concept makes it possible to ensure the complementary development of the sustainable development model, with particular emphasis on the role of the raw materials policy, which should be an advantage, rather than a disadvantage, for the country’s economic development.

Defining the role of the raw materials policy in the process of shaping sustainable development is inextricably linked to the implementation of legal regulations in this field by the European Union.

2. LEGAL REGULATIONS GOVERNING ESG REPORTING

The legal obligation of ESG reporting in the European Union has been valid since 2017,⁹ and it mainly concerns large public-interest entities, in particular stock-listed companies and financial institutions hiring over 500 employees. In 2019, the European Commission recognised the need to review the Directive, as an element comprising the European Green Deal, which led to the commencement of works on Directive 537/2014 of the European Parliament and of the Council of 14 December 2022 on amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC, and Directive 2013/34/EU in relation to enterprise reporting on sustainable development,¹⁰ which eventually entered into force in January 2023 and shall be fully implemented in 2024.

The Directive introduces the obligation to draw up reports on the enterprise activities, including, on the one hand, information indispensable to understanding the undertaking’s influence on issues related to sustainable development, and, on the other hand, information indicating how the sustainable development issues influence the development outcomes and standing of that entity.

The information mentioned above should contain: a brief description of the undertaking’s business model and strategy, including: 1) the resilience of the undertaking’s business model and strategy in relation to risks related to sustainability matters, 2) the opportunities for the undertaking related to sustainability matters, 3) information on how the undertaking’s business model and strategy take account of the interests of the undertaking’s stakeholders and of the impacts of the undertaking on sustainability matters, 4) how the undertaking’s strategy has been implemented with regard to sustainability matters, namely: a) a description of the time-bound targets

⁹ Official Journal of the European Union, 15.11.2014, L 330/1.

¹⁰ L 322/15.

related to sustainability matters set by the undertaking, including, where appropriate, absolute greenhouse gas emission reduction targets at least for 2030 and 2050, a description of the progress the undertaking has made towards achieving those targets, and a statement of whether the undertaking's targets related to environmental factors are based on conclusive scientific evidence, b) a description of the role of the administrative, management and supervisory bodies with regard to sustainability matters, and of their expertise and skills in relation to fulfilling that role or the access such bodies have to such expertise and skills, c) a description of the undertaking's policies in relation to sustainability matters, d) information about the existence of incentive schemes linked to sustainability matters which are offered to members of the administrative, management and supervisory bodies, e) a description of the due diligence process implemented by the undertaking in relation to sustainability matters, f) a description of the principal risks to the undertaking in relation to sustainability matters (Article 19a(1) and (2) of the Directive 2014/95/EU).

It is worth stressing that the Directive has a very broad material scope, which is numerative and mandatory in nature, since all elements must be fulfilled in order for the reporting obligation to be considered duly met. The aforementioned material scope is, in my opinion, perfectly sufficient at the stage of legislative enactment. It should be noted at this point that, after the legislation has been in force for some time, it will be important to review it, as the above catalogue may be expanded. This will depend on the direction of legal activities in the European Union related to the process of better understanding the sustainable development issues. At the same time, if we analyse the issues of ESG reporting from the point of view of the national raw materials policy (including, in particular, the policy applicable to the geological and mining domain), it should also be noted that the dynamics of the legislative process in this field requires the legislator to conduct an effective legislative review. It appears that one of the *de lege ferenda* postulates should be to place the issues related to above-mentioned information in the Geological and Mining Law in order to highlight the aspects related to the specificity of this domain.

Issues related to the process of ESG reporting on sustainable development are directly connected with the reporting standards which were determined in the Directive analysed herein.

The sustainable development reporting standards specify the information to be provided by entities in accordance with Articles 19a and 29a, and, where applicable, they also indicate how that information should be presented. These standards aim to ensure the quality of reported information, as they require such information to be understandable, relevant, verifiable, comparable and faithfully presented.

In subjective terms, the reporting standards primarily cover the following information: a) the information that undertakings are to disclose about the following environmental factors: climate change mitigation; climate change adaptation; water and marine resources; resource use and the circular economy; pollution; and biodiversity and ecosystems, b) the information that undertakings are to disclose about the following social and human rights factors: (1) equal treatment and opportunities for all, including gender equality and equal pay for work of equal value, training and skills development, the employment and inclusion of people with disabilities, measures against violence and harassment in the workplace, and diversity; (2) working conditions, including secure employment, working time, adequate wages, social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements, the information, consultation and participation rights of workers, work-life balance, and health and safety; (3) respect for human rights, fundamental freedoms, democratic principles and standards, as laid down in international instruments; c) the information that undertakings are to disclose about the following governance factors: (1) the role of the undertaking's administrative, management and supervisory bodies with regard to sustainability matters, and their composition, as well as their expertise and skills in relation to fulfilling that role or the access such bodies have to such expertise and skills; (2) the main features of the undertaking's internal control and risk management systems in relation to the sustainability reporting and decision-making process; (3) business ethics and corporate culture, including anti-corruption and bribery, the protection of whistleblowers, and animal welfare; (4) activities and commitments of the undertaking related to exerting its political influence, including its lobbying activities; (5) the management and quality of relationships with customers, suppliers and communities affected by the activities of the undertaking, including payment practices, especially with regard to late payment to small and medium-sized undertakings (Article 29b(1) and (2)).

Summing up, the reporting standards listed in the Directive are divided into thematic standards which cover the following three groups: environmental, employee and corporate governance domains.¹¹ For the purpose of this article, only selected standards, i.e., those related to the environmental area, will be analysed, as they are the most relevant for implementation in the geological and mining sector.

First and foremost, climate change was identified as a key standard. Therefore, "all companies subject to ESG reporting shall outline the climate impact of their activities, their existing and planned actions aimed at its

¹¹ Report, p. 7.

mitigation, prevention or remediation; they should also analyse in detail the risks (transformational and physical) and opportunities associated with climate change.”¹² In addition, it is worth noting that “greenhouse gas emission reduction targets should be disclosed as part of the standard. This includes the emission of greenhouse gases, namely carbon dioxide, methane, nitrous oxide and fluorinated gases. The standard also provides for the disclosure of information on energy consumption and energy mix. Undertakings are required to present their total energy consumption in MWh by renewable and non-renewable energy sources, with a further breakdown into more detailed subcategories.”¹³ The guidelines related to the climate change process, which have a significant impact on the development of the raw materials policy in Poland, should be analysed in detail by the relevant entities in the field of geological and mining administration.

Another important element is the pollution standard, stipulating that “the undertaking should describe how it prevents and manages pollution resulting from its activities. The standard focuses on disclosing information on air (indoor and outdoor), water and soil pollution. Pollution includes factors of human origin which affect people or the environment, and can result in damage or deterioration to health, property and the environment. Pollutants can be divided into three main groups, i.e., air, water and soil pollutants.”¹⁴ This standard will be of utmost importance to the undertakings operating in the field of raw materials policy, in terms of implementing effective systems contributing to pollution control.

Biodiversity and ecosystems constitute another standard. This one concerns “the relationship between the undertaking’s activities, on the one hand, and biodiversity and ecosystem change, on the other. The underlying causes of biodiversity loss include: climate change, pollution, change in the use of land and water surface (e.g., habitat destruction, deforestation or urbanisation), direct exploitation (e.g., overfishing), and invasive alien species. All these causes are connected with a growing population and increased demand for resources. The disclosure of information under this standard will contribute to the implementation of the EU Biodiversity Strategy 2030 as an important element of the European Green Deal”¹⁵. The above standard is directly linked to the sustainable development implementation model in terms of the policies pursued by the European Union. From the point of view of individual Member States, it is crucial to implement raw material policies, including those pertaining to the geological and mining sector constituting a key domain, in an equally responsible manner from

¹² See <https://www.efrag.org/lab6> [accessed: 30.09.2023].

¹³ Report, p. 9-10.

¹⁴ *Ibid.*, p. 10.

¹⁵ *Ibid.*, p. 11.

the perspective of their development prospects. Otherwise, the uniform implementation of the EU Biodiversity Strategy is likely to cause distortions in the sustainable development of individual regions.

Another standard concerns issues related to the use of resources and the shaping of a circular economy. The reporting objectives as part of this standard “focus on activities that implement the concept of a circular economy within an enterprise. The information disclosed largely concern the enterprise’s raw materials policy, including the use of secondary raw materials, eco-design, and waste management. Companies should provide information on the resources they purchase, including the share of raw materials obtained from renewable and secondary sources, and generated by the enterprise, along with indicating products and materials designed in line with the principles of circular economy. Information on packaging or plant equipment will also be provided.”¹⁶ Apparently, the above standard is crucial in the entire catalogue, as it refers primarily to the issue of implementing the principles of a circular economy which, in turn, is specifically related to the raw materials policy. The appropriate implementation of processes by enterprises operating in the geological and mining sector will facilitate the shaping of a circular economy system, and thus the creation of a responsible sustainable development model.

Summing up the standards under analysis, several conclusions can be drawn. First, the standards laid down in the Directive, and referring to environmental areas, constitute a robust information basis for the market shaping the country’s raw materials policy. Assuming that economic entities implementing the raw materials policy provide reliable information, there is a possibility to monitor their activities precisely in terms of how they pursue their objectives connected with developing a sustainable regional development model. Second, the presented standards merely constitute a substantive introduction, with the aim of further clarifying these standards in the future, from a sectoral perspective. It is worth noting that the reporting issues pertaining to the mining and geological sector must also be based on national legal regulations. Therefore, it is necessary to make attempts to clarify this issue and promote it within the public system. The functioning of ESG systems, particularly in the field of the national raw materials policy, is a practically unexplored aspect in the doctrine of legal sciences, as issues related to the law governing sustainable regional development have not been the subject of any extensive scientific discourse. Due to the differences encountered between the various economic sectors, it seems advisable to assign separate standards to specific sectors, e.g., those related to the raw materials policy, so that the actual policies in the field of ESG reporting

¹⁶ Ibid.

and the creation of a sustainable regional development model could be implemented in the most effective way.

CONCLUSION

The implementation process of the analysed Directive within the Polish legal system is intrinsically connected with energy transition activities. The transformations taking place in the context of implementing sustainable development regulations influence the structural transformations occurring in the domain of geological and mining administration. In reality, the lack of appropriate legal instruments would make it impossible to develop the appropriate legal forms of shaping the development of the national raw materials policy with sustainable development in mind.

The analysed provisions of the Directive and the proposed framework of standards must be implemented within the Polish legal system through appropriate documents. On the one hand, these can and should be our national standards referring to the binding raw materials policy. On the other hand, issues related to facilitating sustainable development should be regulated in legal acts. Therefore, a *de lege ferenda* postulate is to regulate the functioning of the ESG reporting system in relation to raw materials policy in the Geological and Mining Law. The consequence of introducing the legal solution proposed above would be the systematisation of procedures related to the process of reporting on sustainable development activities by undertakings pursuing the raw materials policy. In addition, it would allow the geological and mining administration to exercise supervision in this field in a more efficient manner.

The heterogeneity of the implementation of the sustainable development reporting processes in individual EU Member States is worth noting. This implies that ESG reporting in the context of Poland's raw materials policy should be essentially based on standards developed by reference to the EU Directive, on the one hand, and to Polish economic conditions, on the other. The national standards should not aim at excluding or completing with the EU standards, but they should merely complement them through guidelines for public entities. Therefore, a *de lege ferenda* postulate is to develop legal regulations governing the ESG reporting standardisation system, from the point of view of both the EU and national law. This will also allow the specificity of the geological and mining sector in Poland to be taken into account. Moreover, it is crucial to recognise the important role of other documents, often referred to as guidelines, which indicate good practices that may be applied in selected cases. As such, they should be prepared especially for sectors related to the raw materials policy, in order to take into consideration their specific operational conditions. It should, therefore, be expected

that geological and mining administration entities prepare the appropriate guidelines referring to ESG reporting (based on national regulations), which will constitute an additional instrument governing the process in question.

In summary, it should be noted that the challenges connected with energy transformation, and in particular the raw materials policy, require due care for the functioning of the sector in question, in compliance with the applicable laws. The creation of an adequate set of legal instruments, including the ESG reporting obligation, will foster the responsible development of the raw materials security sector, which will also contribute to the functioning of the sustainable regional development model.

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