

LEGAL STRATEGY

Overview of opportunities around the use of strategic litigation for industrial decarbonization, specifically in the steel sector in Poland

I. Objectives to achieve

The general objective should be to reduce emissions of pollutants and greenhouse gases from the largest steel plant in Poland. Given the scale of the undertaking and its significance for the economy, this objective should be achieved gradually to ensure a just transition of the steel sector, respecting the legitimate interests of various stakeholders, particularly the workers. The goal, as far as possible, should not be the closure of the steel plant but rather achieving a situation in which the operator decides to adopt production technology that minimizes the negative impact on the environment, including the climate.

II. Legal goals

The aim of legal actions should be to exert effective pressure on the operator of the installation to enforce technological changes that result in the maximum reduction of pollutant and greenhouse gas emissions. This goal can be achieved through:

- a) obtaining a decision or court ruling requiring the necessary changes to be implemented, or
- b) reaching an agreement or settlement with the operator, in which they commit to carrying out the necessary changes, or
- c) creating pressure arising from legal risks, and indirectly also economic and social risks, associated with the continued operation of the installation in its current form, forcing the operator to carry out necessary changes.

III. Access to information

III.1. Potential legal obstacles

The main issue regarding access to environmental information can be the waiting time for it to be made available. Authorities often extend the time for providing information, especially for documents listed in the so-called publicly accessible registry. In such cases, the content of these documents should be provided on an expedited basis, within three days. However, authorities usually do not fulfil this obligation, although it is rare for the waiting time for document access to exceed 30 days. In the case of smaller installations that do not require an integrated permit, authorities sometimes refuse to disclose parts of the permits citing trade secrets. However, this issue does not arise with integrated permits, where access to information is generally more transparent and regulated.

III.2. Suggested legal responses

The appropriate legal remedy for delays in accessing environmental information is a complaint regarding inaction. Such cases are often successful and filing a complaint can motivate authorities to expedite the release of information. This legal approach serves as an effective tool for individuals seeking timely access to crucial environmental data.

IV. Public participation

IV.1. Potential legal obstacles

Public participation is only ensured in specific proceedings related to integrated permits, primarily when issuing permits for new or significantly modified installations, as well as when deviations from BAT conclusions are granted. Most changes to integrated permits occur without public involvement, which limits opportunities for public engagement in environmental decision-making processes. This lack of participation can lead to concerns about transparency and accountability in how environmental regulations are implemented.

II.2. Suggested legal responses

There is no effective appeal mechanism in place. An environmental organization could attempt to challenge decisions that modify integrated permits in court by arguing that these changes actually constitute a significant alteration of the installation. Consequently, they should have been issued following a procedure involving public participation.

V. Access to justice

V.1. Summary of the main non-compliances with the relevant BAT conclusions

No significant non-compliance with the current BAT conclusions has been identified. The discrepancies noted by the expert are mainly of a formal nature and relate to the incorrect citation of specific points and BAT conclusions in the integrated permit issued for the installation. The actual pollutant emissions, however, appear to be in line with the currently applicable conclusions (with one omission regarding CO and TOC which cannot be considered as very serious). Furthermore, according to available data, air pollutant emissions do not cause significant exceedances of air quality standards (the existing exceedances in the region are predominantly caused by emissions from small boilers and furnaces powered by solid fuels used for heating).

It should be emphasized, however, that in the face of the growing climate crisis and significant CO₂ emissions from the steel production process, the key focus should be on substantially reducing greenhouse gas emissions from the steel production and processing. This can be achieved by changing the technology, which would require a complete overhaul of a significant part of the installation, leading to very substantial costs. Therefore, legal

actions should focus on exerting pressure to enforce a shift towards zero-emission steel production technologies.

V.2. Short description of the potential legal responses

We identified three potential legal pathways that can be utilized despite the absence of significant violations of BAT conclusions. These pathways have been employed in other cases where operations were generally conducted in accordance with legal permits but resulted in significantly negative environmental impacts and contradicted principles of social coexistence.

i. Environmental Review.

This legal pathway involves advocating for the issuance of a decision that mandates an environmental review of the facility's operations. If circumstances indicate a potential negative impact of the facility on the environment, the provisions of the Environmental Protection Law (EPL) allow for the imposition of an obligation to prepare an environmental review. This review serves as a document that enables the assessment of the actual environmental impacts of an already operating installation. It is similar in nature to an Environmental Impact Assessment report but is prepared during the operational phase of the facility.

According to Article 237 of the EPL, the competent environmental authority can optionally issue a decision requiring the operator of the facility to prepare an environmental review. In the case of a steelworks, this authority would be the provincial Marshall.

It is important to highlight that the imposition of the obligation to prepare an environmental review can be based on the mere demonstration of a potential risk of negative environmental impact. This means that even a potential threat is sufficient for such a requirement. This is supported by administrative court rulings, which clarify that negative environmental impacts are not solely determined by whether a facility exceeds legally established maximum safe limits.

The courts have acknowledged that even when permissible levels of impact are maintained, there can still be a negative effect on the environment, especially in the case of facilities known to cause such impacts by their very nature.

However, the decision to impose such an obligation must be adequately justified. This involves providing evidence of the potential negative impact of the installation on the environment, particularly by showing that other means of evidence are insufficient to demonstrate the negative effects. This ensures that the decision is not arbitrary but based on a comprehensive assessment of the situation.

The need for an environmental review can be supported by complaints from local residents regarding pollution, odours, and other negative impacts resulting from the operation of the facility.

A civil society organization can submit a request for the issuance of a decision ordering the environmental review, however it has to demonstrate that it aligns with its statutory goals (e.g., environmental protection) and serves the public interest. An environmental review can provide crucial insights into the actual environmental impact of a project, contrasting with the information presented in the permit.

Although the operator of the facility prepares the review, the analyses often reveal excessive negative impacts, leading to the initiation of further procedures. Notably, all associated costs are borne by the facility operator, emphasizing their responsibility for addressing environmental concerns raised through the review process.

ii. Decision mandating the reduction of negative environmental impacts.

The decision to mandate the reduction of negative environmental impacts is issued by the relevant authority, which, in the case of a steelworks, is the provincial marshal, based on the art. 362 of the EPL.

This decision is a specific instrument of environmental law that, according to views expressed in legal literature, can also be applied when negative environmental impacts are legally compliant (conducted based on and within the limits of a permit) but are excessive in nature, significantly burden the natural environment, and violate general principles of environmental protection.

This legal pathway is currently being tested by the Frank Bold Foundation in a case concerning the limitation of legal but significantly high methane emissions from a hard coal mine.

The application to initiate proceedings can be submitted by a civil society organization; however, it must demonstrate a connection to its statutory objectives (e.g., environmental protection) and the public interest—an aspect that can be practically challenging. This requirement is often scrutinized, as organizations must clearly articulate how their objectives align with broader societal benefits to gain standing in legal matters concerning environmental issues. Support from the local community or local authorities can be beneficial.

The advantage of this procedure is its minimal cost. There are no costs at the administrative stage, and any potential appeals to administrative courts are associated with only symbolic fees.

In theory, the authority has significant discretion in determining obligations related to reducing negative environmental impacts. However, in practice, such extensive freedom and the lack of clear statutory guidelines may discourage authorities from issuing "risky" decisions.

iii. Environmental civil litigation

Polish environmental law includes a unique legal instrument within civil law: a lawsuit aimed at restoring legal compliance and implementing preventive measures (art. 323 of the EPL). This can involve installing systems or devices to mitigate potential threats or violations. If such installation is impractical or overly burdensome, the lawsuit may seek to halt activities causing the threat or violation.

Anyone who is directly threatened with damage due to unlawful environmental impacts or who has already suffered harm can file a lawsuit.

However, it is especially significant that environmental organizations, which work to protect the environment as a common good, are granted the legal standing to file such a lawsuit. These organizations are not required to demonstrate an individual legal interest or a causal link between the harm suffered and the environmental impact. For them, harm is represented by the mere negative impact on the environment, with the organization acting as "advocates for the environment." This means that the lawsuit may be considered a type of *actio popularis*.

These legal provisions are utilized in challenging environmental cases, such as the lawsuit filed by Greenpeace Poland represented by Frank Bold against PGE SA (biggest Polish utility), demanding an end to greenhouse gas emissions resulting from coal combustion.

An important aspect of this is that it is a civil law instrument. Therefore, "unlawfulness" of environmental impact is interpreted here according to the civil law concept of unlawfulness, which is much broader than that used in administrative law. In civil law, unlawful acts include not only those that violate specific regulations or administrative decisions but also those actions that are contrary to principles of social coexistence.

This is confirmed by Article 325 of the EPL, which stipulates that liability for damages caused by environmental impact is not excluded by the fact that the activity causing the damage is conducted within the scope of and in compliance with a decision.

For these reasons, it is also possible to demonstrate unlawfulness based on international soft law establishing requirements in the field of human rights protection in business.

An additional factor that could potentially facilitate assigning liability to the defendant is the application of the principle of liability based on risk (i.e. strict liability) in the case of enterprises driven by natural forces (to which category steelworks qualifies without any doubt). This principle removes the need to prove fault or negligence. This aspect is particularly important because the defendant would likely argue that they bear no fault, asserting that they acted in good faith in accordance with the legally granted permit.

However, it should be noted that proceedings of this kind are always precedent-setting, require significant involvement from lawyers and experts, and potentially generate substantial costs, with uncertain outcomes. For instance, the case of Greenpeace Poland against PGE has been ongoing since the beginning of 2020, and a ruling in the first instance is unlikely to be issued before 2025.

The legal analysis indicates that under Article 323 of the EPL, it is permissible to file a motion for securing claims by ordering the defendant to undertake actions specified in the lawsuit for the duration of the proceedings (until a judgment is issued). This is allowed only if such a measure is necessary to prevent imminent harm or other adverse effects on the claimant's rights.

For example, this precautionary measure could involve mandating a reduction in production. However, it's essential to note that if the security is granted and the plaintiff ultimately loses the case, the defendant may seek substantial compensation for losses incurred due to the imposed measures. This potential for significant financial liability should be carefully considered when deciding to pursue such legal action.

In the event of losing the case, it will be necessary to cover potentially significant legal costs incurred by the opposing party.

Therefore, the decision to file such a lawsuit should be made only in strategic cases when sufficient financial, legal, and expert resources are available, given the likelihood of a lengthy, multi-year character of the litigation.

Nevertheless from a legal perspective, preparing a lawsuit based on Article 323 of the EPL appears quite feasible, especially if it focuses on limiting greenhouse gas emissions. This strategy could leverage legal arguments already developed in similar climate litigation cases in Poland (notably the GP vs PGE case) as well as abroad, notably the Milieudefensie et al. v.

Royal Dutch Shell (RDS) case, which had significant implications for climate accountability worldwide. In the RDS case the Dutch court asserted that emission reduction obligation ensues from the unwritten standard of care which is a similar concept to the Polish principles of social coexistence.

V.3. Comparison of efficiency of possible legal actions, legal and other barriers, risks

strategy	Environmental review	Administrative procedure (art. 362 EPL)	Lawsuit (art. 323 EPL)
potential outcome	Obtaining up-to-date and comprehensive information about the facility's impact on the environment.	Obtaining a decision mandating technological changes reducing emissions.	Obtaining a judgment mandating technological changes reducing emissions.
costs	Very low	Very low	High/very high
timeline	1-2 years for a final decision + 6-12 months for submitting the review.	1-2 years for a final decision, several more years if the case is referred to the court.	3+ years.
possibility of immediate action	Possible, however some preliminary expert input and research would be beneficial.	Some preliminary expert input and research would be necessary.	Demands careful preparations, securing funding and broad scope expert support.

V.4. Conclusion, recommended legal action(s)

The first, non-legal recommendation is to establish contact with representatives of the local community and seek individuals affected by the negative impacts of the steelworks. It is worth noting that in recent months, individuals from Dąbrowa Górnicza have reached out to Frank Bold with concerns about the poor environmental conditions and issues with local industrial operations. However, assessing the validity of these claims falls outside the scope of this project.

Next, a decision must be made regarding whether legal actions should focus on mitigating the negative impact on the environment as a whole, selected elements of the environment, or a single, specific aspect of the natural environment (e.g., climate). Based on this, available data should be collected, and private expert opinions should be sought to identify potential negative effects of the facility's operations. It should be noted, that focusing on climate

protection and countering greenhouse gas emissions seems to have the greatest importance and potential.

The decision on the next steps should be based on the collected data and expert opinions. If significant negative impacts are identified (in case of the negative impact on climate it doesn't require much research as the data on the annual CO2 emissions is available), even if they are legal (i.e., compliant with the permit), it would be reasonable to prepare and submit a request (based on art. 31 of the Code of Administrative Proceedings) from a civil society organization to initiate proceedings under Article 362 of the EPL, concerning the issuing of a decision mandating the limitation of negative environmental impacts.

If there is a lack of data regarding the actual environmental impacts, a suitable first step could be to request an environmental review. However, this initiates a separate procedure that may take several years and significantly delay achieving tangible changes.

A lawsuit based on Article 323 of the EPL should only be considered if the case is of priority significance and stable, long-term funding and appropriate expert support are available. However, it should be emphasized that due to its nature (many public hearings, questioning of witnesses and experts etc.), civil proceedings usually offer the greatest potential for building a communications campaign.

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