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## Realizing EU ETS Monitoring and Compliance in Poland

### Realizacja nadzoru i zgodności z Europejskim Systemem Handlu Emisjami w Polsce

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#### Abstract

The success of the European Union Emissions Trading Scheme (EU ETS) as a whole depends on proper national monitoring and compliance mechanisms in each of the 31 participating States. This article will focus on the legal and

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practical realization of an EU ETS monitoring and compliance system in Poland – being one of the EU member States where the gradual realization of the EU ETS system is meeting strong political resistance.

Keywords: EU Emissions Trading System; Poland; monitoring; compliance; legal implementation.

## Streszczenie

Sukces Europejskiego Systemu Handlu Emisjami (EU ETS) jako całości leży w należycie prowadzonych, na poziomie krajowym przez wszystkie 31 kraje uczestniczące, mechanizmach nadzoru i zgodności. Niniejszy artykuł koncentrować się będzie na prawnym i praktycznym aspekcie realizacji Europejskiego Systemu Handlu Emisjami (EU ETS) w Polsce, będącej jednym z państw członkowskich Unii Europejskiej, gdzie stopniowa realizacja tegoż Systemu ściera się z silnym politycznym oporem.

Słowa kluczowe: Europejskiego Systemu Handlu Emisjami (EU ETS); Polska; nadzór; zgodność; implementacja prawna.

## 1. Introduction

The European Union Emissions Trading Scheme (EU ETS) is the largest trading program in the world designed to combat global climate change. The theory behind emissions trading is that a market mechanism is established in order to mitigate greenhouse gasses. After a cap is set and potential polluting firms have obtained allowances to emit, they can either (1) reduce their emissions and sell their allowances by, for example, investing in technological innovation; (2) use their allowances in order to cover their emissions; or, (3) increase their emissions by buying additional allowances on the market. However, the effectiveness of the system – scrutinized since its inception in 2005 by both economists and lawyers – thus far is disappointing<sup>1</sup>.

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<sup>1</sup> J. Verschuuren and F. Fleurke, *supra* note 1, p. 8.

In practice, the success of the system will depend on control and compliance. Carrying out complete, coherent, transparent and accurate controlling and reporting on emission of greenhouse gases is considered fundamental for a proper functioning of the system<sup>2</sup>. The Commission already emphasised the importance of oversight and enforcement in its Green Paper on emission trading in the year 2000, by stating that: ‘The purpose of strict compliance provisions and enforcement is to enhance confidence in the trading system, make it work in an efficient way in accordance with the rules of the internal market and at the same time increase the likelihood of achieving the desired environmental result<sup>3</sup>. Compliance in this sense means monitoring the operation of covered installations to ensure that they operate in accordance with the requirements of the EU ETS in order to determine whether further inspection or enforcement is necessary to ensure compliance<sup>4</sup>. Whereas other parts of the EU ETS system have been centralized and harmonized over the last decade, this process did not encompass the entire compliance cycle: national competent authorities are still responsible for inspection and sanctioning<sup>5</sup>.

A proper national monitoring and compliance mechanisms in each of the 31 participating States is important for the effectiveness and reliability of the EU ETS system as a whole. Therefore this article will focus on Poland, being one of the EU member States where the political acceptance of the EU ETS system appears to be extremely cumbersome due to a widespread conviction that the European energy and climate policy will lead to energy poverty and will affect the welfare of Polish families<sup>6</sup>. This article aims to assess to what extent Poland, in a political climate of strong resistance against the EU ETS system, has succeeded, first, to ensure the legal implementation of the EU ETS system in Polish law and policy

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<sup>2</sup> M. Jaś, *Greenhouse gas emission allowance trading scheme in the Polish law*, Polish Yearbook of Environmental law, No 2, 2012, p. 114.

<sup>3</sup> European Commission, Green Paper on greenhouse gas emissions trading, 8 March 2000, COM/2000/87, p. 24.

<sup>4</sup> IMPEL Report, *Options and Proposals for Consistency in the Implementation of the EU Emissions Trading Scheme* Report 4: Good Practice in Compliance and Enforcement, May 2007, p. 3.

<sup>5</sup> J. Verschuuren and F. Fleurke, *supra* note 1, at p. 6.

<sup>6</sup> A. Ancygier, *The 2030 target: A game changer for Poland*, available at <http://www.euractiv.com/sections/energy/2030-targets-game-changer-poland-309589> [May 2015].

and, second, to establish an effective and reliably EU ETS monitoring and enforcement system.

After a short account, in section 2, of the way Poland is dealing with its obligations emanating from the Kyoto Protocol, section 3 considers the legal implementation of the EU ETS in Polish law and policy. Section 4 describes and analyses the establishment in practice of an EU ETS monitoring system in Poland, and section 5 explores its enforcement system. Section 6 contains some concluding observations as to way Poland has put into operation its monitoring and enforcement obligations pertaining to the EU ETS system.

Since Poland became member of the EU as of 1 May 2004 and the EU ETS system did not begin to function in Poland until the summer of 2006, this study of the enforcement of EU ETS in Poland will focus on the end of the First Phase (2005-2007) and the Second Phase (2008-2012) linked to the implementation of the initial directive governing the ETS system, Directive 2003/87/EC of 13 October 2003 and the first amending Directive 2004/101/EC of 27 October 2004 establishing a scheme for greenhouse gas emission allowance trading within the Community in respect of the Kyoto Protocol's project mechanisms. This article will also discuss some aspects of the (legal) preparation for the Third Phase (2013-2020) as set out Directive 2008/101/EC of 19 November 2008, amending Directive 2003/87/EC so as to include aviation activities in the scheme for GHG emission allowance trading within the Community, and Directive 2009/29/EC of 23 April 2009 amending the Directive 2003/87/EC so as to improve and extend the GHG allowance trading scheme of the Community.

## 2. Poland and Kyoto

It was only after 1989 that policy makers in Poland started to focus on environmental and climate change issues<sup>7</sup>. Until Poland's EU accession on 1 May 2004, Polish policy and law on climate change were shaped by the goals of the United Nations Framework Convention on Climate Change

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<sup>7</sup> L. Karski, *Climate law in Poland towards an overall regulation*, in: *Climate Law in EU Member States*, eds. M. Peeters, M. Stallworthy, J. de Cendra de Larragán, Edward Elgar, 2012, p. 237.

(UNFCCC)<sup>8</sup> and to its Kyoto Protocol<sup>9</sup>. One of the main obligations resulting from ratification of the Kyoto Protocol by Poland was to reduce the greenhouse gas emissions by 6% in 2008-2012 in relation to the base year which was chosen as 1988 according to article 4.6 of the UNFCCC and Decision 9/CP.2. Poland succeeded in fulfilling its obligations under the UNFCCC and the Kyoto Protocol<sup>10</sup>. According to Poland's Fifth National Communication under the UNFCCC, 'an efficient system of emission permits, thermal modernization, penalties and fees, and the financing of emissions reduction and new low-carbon technologies from environmental protection funds, have largely contributed to the achievement by Poland of a reduction of about 30 per cent in greenhouse gas emissions compared to the base year 1988<sup>11</sup>. Karski even highlights that, 'thanks to instruments provided for in domestic environmental law and energy law, significantly better results have been achieved than in case of most other countries that have reduction commitments under the Kyoto Protocol'<sup>12</sup>.

However, Karski also underlines that 'the role of the socio-economic transformation, which resulted in the collapse of a broad spectrum of highly polluting enterprises and a growing importance of environmental values, cannot be underestimated here'<sup>13</sup>. Also the recent Sandbag report *Sharing the load – Poland's coming of age on climate policy* mentions the fact that 'the transition to a market economy has seen a dramatic decoupling of growth from emissions. Since 1988<sup>14</sup> Poland's emissions have fallen by 31% and

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<sup>8</sup> Ratified by Poland on 16 June 1994 (signed on 5 June 1992).

<sup>9</sup> Ratified by Poland on 13 December 2002 (signed on 15 July 1998).

<sup>10</sup> National inventory Report 2013, available at [http://www.kobize.pl/materialy/Inwentaryzacje\\_krajowe/2013/NIR-2013-PL-en.pdf](http://www.kobize.pl/materialy/Inwentaryzacje_krajowe/2013/NIR-2013-PL-en.pdf) [May 2015].

<sup>11</sup> Republic of Poland, Fifth National Communication under the United Nations Framework Convention on Climate Change, Warsaw 2012, p. 7, available at [http://unfccc.int/resource/docs/natc/pol\\_nc5.pdf](http://unfccc.int/resource/docs/natc/pol_nc5.pdf) [May 2015].

The Sixth National Report of 2013 is available at [http://unfccc.int/files/national\\_reports/annex\\_i\\_natcom/submitted\\_natcom/application/pdf/pol\\_nc6.pdf](http://unfccc.int/files/national_reports/annex_i_natcom/submitted_natcom/application/pdf/pol_nc6.pdf).

Also see L. Karski, *supra* note 8, at p. 254.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> While most Kyoto countries use 1990 as a baseline year, Poland managed to secure an exceptional baseline of 1988. That year was significant for being the last full year of Communist rule in Poland, but notably emissions had fallen by a staggering 19% in the two years between 1988 and 1990. Sandbag, *Sharing the load – Poland's coming of age on climate policy*, 20 March 2014, pp. 3 and 5,

the carbon intensity of the economy has fallen by 90%<sup>15</sup>. Nonetheless, the report strongly emphasizes that Poland remains the fourth largest emitter in the EU28, with CO<sub>2</sub> emissions of 387 million in 2012, and is also the 10<sup>th</sup> largest EU emitter on a per capita basis, emitting 10 tonnes per person in 2012, and criticizes the fact that ‘despite its sizeable emissions, the carbon budgets set for Poland under the Climate and Energy Package for 2013-2020 are, on average, 3% *higher* than its current emissions levels.’ Poland was granted these carbon concessions in acknowledgement of the special challenges it has faced in its transition from Communism to a market economy<sup>16</sup>.

The Sandbag report concludes that ‘as Poland’s economy matures it should be weaning itself off special concessions<sup>17</sup> and taking on more climate responsibilities, not shirking them, and certainly not holding back the wider European effort.’ The report subsequently points out that ‘despite all of the special arrangements that have been put in place to assist Poland in the transition to a lower carbon economy, Poland has been steadfast in resisting efforts to agree new climate targets after 2020, vetoing Council conclusions on both the Low Carbon Roadmap and the Energy Roadmap to 2050, and warning that they will veto a 2030 climate target if leaders attempt to agree one in the European Council this March<sup>18</sup>. It came as a surprise that Poland<sup>19</sup>, instead of casting a veto, agreed to the target of reducing CO<sub>2</sub> emissions by “at least 40%” until 2030. At the same time, however, the Polish Prime Minister Kopacz has ‘won the EU summit<sup>20</sup> by

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available at [http://www.sandbag.org.uk/site\\_media/pdfs/reports/Sharing\\_The\\_Load.pdf](http://www.sandbag.org.uk/site_media/pdfs/reports/Sharing_The_Load.pdf) [May 2015].

<sup>15</sup> *Id.* at pp. 3 and 5.

<sup>16</sup> *Id.* at p. 3.

<sup>17</sup> See also the cases brought by ClientEarth, available at <http://www.rp.pl/artykul/696027.html> [May 2015].

<sup>18</sup> Sandbag, *supra* note 15, at p. 17. Also see: M. McGrath, ‘“Messy compromise” expected on EU climate targets’, BBC News, 23 October 2014, available at <http://www.bbc.com/news/science-environment-29737719> [May 2015].

<sup>19</sup> T. Bielecki, *Weto nie byłoby dobre*, and: *Ekokompromis w Brukseli*, Gazeta Wyborcza, 25-26 October 2014, pp. 2 and 11.

<sup>20</sup> See: <http://www.euractiv.com/sections/energy/poland-says-it-won-eu-summit-309494> [May 2015].

demanding the right to provide Polish energy companies with up to 40% of their allowances for free until 2030<sup>21</sup>.

### 3. Legal Implementation of EU ETS

Compared to Poland's successful fulfilment of its UNFCCC and Kyoto obligations, the situation of the implementation of EU law and policy<sup>22</sup> looks different. According to Karski, this area of Polish law 'is characterized by weak links between its instruments'<sup>23</sup>. He gives the following background to this development: 'When the process of negotiation on Poland's accession to the EU was initiated and continued, the EU acquis in the area of climate issues had not yet been developed. The significant reduction of greenhouse gas emissions seemed to leave Poland some leeway in the implementation of EU tasks. When going through the transformation, Poland had not focused adequately on creating an impulse to modernize the economy. A rude surprise came in the form of the consequences of Directive 2003/87/EC of October 2003. [...] The EC directive of 2003 was implemented by the Act of 22 December 2004<sup>24</sup>; however, the EU ETS did not begin to function in Poland until the summer of 2006. This was due largely to the lack of adjustment of the system provided for in Directive 2003/87/EC to the accession of member states which had already reduced their emissions'<sup>25</sup>. The emission trading system in Poland is based on several acts and regulations. The legal basis for the ETS system in Poland was established by the Act of 22 December 2004 on trade of allowances to emit greenhouse gases (GHG) and other substances to the air (hereinafter: "Emission Trading Act" or "ETA")<sup>26</sup> that implemented Directive 2003/87/EC. The subsequent Act of 17 July 2009 on the management

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<sup>21</sup> European Council (23 and 24 October 2014) Conclusions on 2030 Climate and Energy Policy Framework par. 2.5, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/145356.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/145356.pdf) [May 2015].

<sup>22</sup> L. Karski, *supra* note 8, at p. 236.

<sup>23</sup> *Id.* at p. 254.

<sup>24</sup> Act of 22 December 2004 on trade of allowances to emit greenhouse gases (GHG) and other substances to the air, *Journal of Laws*, No 281, item 2784.

<sup>25</sup> L. Karski, *supra* note 8, at p. 237.

<sup>26</sup> *Supra* note 25.

of emissions of GHG and other substances (hereinafter: “Emission Management Act” or “EMA”)<sup>27</sup> focuses on monitoring and management of the Kyoto units, thus implementing Directive 2004/101/EC. The following act, amending the two previous acts, is the Act of 28th of April 2011 on the emission trading system (hereinafter: “ETS Act”)<sup>28</sup> aims to implement Directive 2008/101/EC and Directive 2009/29/EC. The amendments to national law were made to facilitate the implementation and approval of projects (e.g. renewable energy sources, Joint Implementation projects) for the reduction of greenhouse gas emissions from installations covered by the EU ETS. The most recent act, amending the previous ETS Act of 2011, is the long-awaited Act of 12 June 2015 on the greenhouse gas emission allowance trading scheme<sup>29</sup> (hereinafter: “ETS Act 2015”). The Act aims to complete the implementation of Directive 2009/29/EC in Polish law.

### 3.1. The Polish Emission Trading Act (ETA)<sup>30</sup>

The Emission Trading Act established the general framework for the Polish emission trading system<sup>31</sup>, and provided for the necessary procedures and administrative structure to make emission trading operational in Poland<sup>32</sup>. It regulates its scope<sup>33</sup>, the permit procedure<sup>34</sup>, the procedure for issuing allowances<sup>35</sup>, the design of a national emission trading registry<sup>36</sup>, the tasks of the National Administrator of the ETS (“NAETS” or “KASHUE”)<sup>37</sup>,

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<sup>27</sup> Act of 17 July 2009 on the management of emissions of GHG and other substances, Journal of Laws of 2009, No 130, item 1070.

<sup>28</sup> Act of 28th of April 2011 on the emission trading system, Journal of Laws of 2011, No 122, item 695.

<sup>29</sup> Act of 12 June 2015 on the greenhouse gas emission allowance trading scheme, Journal of Laws of 2015, item 1223.

<sup>30</sup> *Supra* note 25.

<sup>31</sup> Article 1 ETA.

<sup>32</sup> In particular on the ETA see: M. Stoczkiewicz, *The emission trading schema in Polish Law. Selected problems related to the scope of derogation from the general rule for auctioning in Poland*, Yearbook of Antitrust and Regulatory Studies, Vol. 2011, 4 (4).

<sup>33</sup> Article 5-8 ETA.

<sup>34</sup> Article 33-39 ETA.

<sup>35</sup> Article 22-33 ETA.

<sup>36</sup> Article 10-13 ETA.

<sup>37</sup> Article 9 ETA.

as well as provisions on the transfer of allowances and compliance instruments<sup>38</sup>. The ETA system includes two sub-systems: 1) a community emission trading system, and 2) a national emission trading system<sup>39</sup>. The system covers GHGs<sup>40</sup> and other substances<sup>41</sup>. The community emission trading system covers GHGs. The national emission trading system covers the emission of ‘other substances’ into the air. A detailed list of the types of installations that have to be included in the system and their respective thresholds are set out in the regulation of the Minister of the Environment of 27 July 2009 on the types of installations covered by the Community emission allowance trading<sup>42</sup>.

### 3.2. The Emission Management Act of 17 July 2009 (EMA)<sup>43</sup>

The Act of 17 July 2009 on the management of emissions of GHG and other substances (Hereafter: “Emission Management Act” or “EMA”)<sup>44</sup> transposes regulations of the so called Linking Directive (2004/101/EC). This Act sets forth the responsibilities of the National Centre for Emission Balancing and Management (KOBIZE)<sup>45</sup> and the principles of the operation of the National System for Emission Balancing and Forecasting. Further, it regulates the principles of the management of emissions of greenhouse gases and other substances; the principles of the operation of the National Registry of the Kyoto Units and emission allowance and the principles of trading in and managing the Kyoto units. It also provides the legal framework for the operation of the National Green Investment Scheme and the Climate Account, and of the management of the Joint

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<sup>38</sup> Article 40-52 ETA.

<sup>39</sup> Article 5 item 1 ETA.

<sup>40</sup> GHGs are described in Annex II to the ETS Directive as: carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF<sub>6</sub>).

<sup>41</sup> ‘Other substances’ covered by the system are sulphur dioxide (SO<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>) and dusts.

<sup>42</sup> Available at [http://www.kobize.pl/materialy/krajowe/rozp\\_MS\\_z\\_27\\_lipca\\_2009.pdf](http://www.kobize.pl/materialy/krajowe/rozp_MS_z_27_lipca_2009.pdf).

<sup>43</sup> *Supra* note 28.

<sup>44</sup> *Id.*

<sup>45</sup> Article 3 EMA.

Implementation projects and Clean Development Mechanism projects in the territory of the Republic of Poland<sup>46</sup>. The list of greenhouse gases and other substances released into the air and covered by the system for the management of emissions of greenhouse gases and other substances is set out in the Annex to this Act<sup>47</sup>.

### 3.3. Emission Trading System Act of 28th of April 2011 (ETS Act)<sup>48</sup>

ETS Act on the emission trading system of 28 April 2011 entered into force on 21 June 2011 and replaces the law of 22 December 2004 on the Polish Emission Trading Act (ETA). It regulates the functioning of the ETS scheme in the current trading period (2008-2013) – which in many important aspects differs from the rules that have been binding as of 2013. The Act relates only in certain provisions to the trading period 2013-2020.

ETS Act encompasses the emission of GHG from: 1) installations carrying out an activity causing emission if the installations meet the capacity thresholds, 2) aircraft operations which begin or end at the territory of the EU member State<sup>49</sup>. The law implements provision relating to 1) qualification of the installations to be covered by the schema<sup>50</sup>, 2) inclusion into the ETS scheme of aircraft operation performed by the aircraft operator<sup>51</sup>, 3) rules for disposing of emission allowances<sup>52</sup>, 4) rules for auctions<sup>53</sup> (relating to the second trading period), 5) the system for effective sanctions safeguarding the performance of the obligations imposed by the law<sup>54</sup>.

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<sup>46</sup> Article 1 item 1 EMA.

<sup>47</sup> Article 1 item 2 EMA.

<sup>48</sup> *Supra* note 29.

<sup>49</sup> Article 1 item 1 and 2 ETS Act.

<sup>50</sup> Article 68 and Annex A en B.

<sup>51</sup> Article 22-28 ETS Act.

<sup>52</sup> Article 40-50 ETS Act.

<sup>53</sup> Article 29-39 ETS Act.

<sup>54</sup> Article 51-67 and 70-77 ETS Act.

### 3.4. Preliminary Conclusion

As regards the contribution of ETS Act to the functioning of ETS in Poland, Jaś concluded the following: “ETS Act combines provisions of the Phase II with the provisions of the Phase III. As a matter of fact, the implementation of provisions of the Directive 2009/29 and other provisions of the Community law relating to the functioning of the ETS into the Polish legal system by the Act of 28 April 2011 is a work in progress<sup>55</sup>. The issues to be regulated include the terms of purchase of missing allowances at auctions, rules for allocation of free allowances (under articles 10(a) and 10(c) of the Directive 2009/29/EC), and the way of spending funds received from the sale of emission allowances. Much as these changes to the Act are absolutely necessary, it seems hardly possible that this will be done before the end of the second accounting period. It can be expected that it will rather be the period of the creative interpretation of the law and the close cooperation between the national administration and the government in terms of negotiating the scope of application and enforcement of the provisions of law”<sup>56</sup>. Stoczkiewicz is even more critical about the 2011 ETS Act. He points particularly at the lack of transposition of article 10(a), 10(c) and 3 (h) of Directive 2009/29/EC and the fact that “due to these deficiencies in transposition, Polish legislation does not exclude the possibility of free allowances for new entrants, i.e. installations that have obtained their first greenhouse gas emissions permit after 30 June 2011<sup>57</sup>”. In fact, the Polish Legislator forgot to transpose and implement the principles concerning auctioning and, instead, only took care of the exceptions to this principle<sup>58</sup>. Stoczkiewicz therefore concludes that “this partial and faulty transposition has a significant impact on the implementation of the amended Directive 2003/87/EC and jeopardizes the achievement of the Directive’s

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<sup>55</sup> See for a very critical analysis of this Act by M. Stoczkiewicz: *Black Paper. Implementation of EU Climate and Energy Law in Poland*, 2012, pp. 12-19, available at <http://www.clientearth.org/reports/061113-climate-and-energy-black-paper.pdf> [May 2015].

<sup>56</sup> M. Jaś, *supra* note 3, at p. 117.

<sup>57</sup> See for instance <http://www.kobize.pl/news/302/116/Przydzial-darmowych-uprawnien-do-emisji.html> [November 2014].

<sup>58</sup> Questionnaire ClientEarth, received 26 April 2014. Also see: ClientEarth, *Opinia prawna dotycząca Rozdziału 7 (Art. 48) projektu ustawy o systemie handlu uprawnieniami do emisji gazów cieplarnianych*, November 2010, available at <http://www.clientearth.org/reports/opinia-prawna-nt-rozdzialu-7-art-48-final.pdf> [November 2014].

objectives”<sup>59</sup>. It can be concluded that, whereas Directive 2003/87/EC has been transposed correctly in Polish law<sup>60</sup>, Poland did not manage to adopt on time a legal act that would fully transpose Directive 2003/87/EC as amended by Directive 2009/29/EC. As Poland did not transpose Directive 2009/29/EC on time, on 31 January 2013 the European Commission sent to the Polish authorities a formal notice, based on article 258 of the Treaty on the Functioning of the European Union<sup>61</sup>. On 12 June 2015 the Polish Parliament eventually adopted<sup>62</sup> the Act on the greenhouse gas emission allowance trading scheme<sup>63</sup> replacing ETS Act of 28 April 2011. The new Act entered into force on 9 September 2015 and aims, i.a., at a gradual realization of the national auctioning system<sup>64</sup>.

## 4. Monitoring

### 4.1. National Competent Authorities

Poland is a regionalised unitary state, with 3 levels of sub-national government: 16 voivodeships (regions); 314 poviats (upper tier local governments – counties); 2,478 municipalities (upper tier/ lower tier)<sup>65</sup>. Due to the complexity of the administrative system and of the environmental

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<sup>59</sup> M. Stoczkiewicz, *supra* note 55, at p. 15; M. Stoczkiewicz, *supra* note 32, at pp. 104-106.

<sup>60</sup> Questionnaire ClientEarth, received 26 April 2014.

<sup>61</sup> M. Stoczkiewicz, *supra* note 55, at pp. 12-19.

<sup>62</sup> K. Pliszczyńska, *Sejm uchwalil ustawę o systemie handlu uprawnieniami do emisji gazów cieplarnianych*, 12-6-2015, [https://www.mos.gov.pl/artykul/7\\_aktualnosci/24698\\_sejm\\_uchwalil\\_ustawe\\_o\\_systemie\\_handlu\\_uprawnieniami\\_do\\_emisji\\_gazow\\_cieplarnianych.html](https://www.mos.gov.pl/artykul/7_aktualnosci/24698_sejm_uchwalil_ustawe_o_systemie_handlu_uprawnieniami_do_emisji_gazow_cieplarnianych.html) [1.11.2015].

<sup>63</sup> Act of 12 June 2015 on the greenhouse gas emission allowance trading scheme, Journal of Laws of 2015, item 1223. Available at: <http://www.oigr.pl/pliki/legislacyjne/22-05-2014.pdf> [1.11.2015].

<sup>64</sup> B. Brynczak, *Nowe obowiązki przedsiębiorców w ustawie o systemie handlu uprawnieniami do emisji gazów cieplarnianych*, 4 September 2015, [http://www.cire.pl/pliki/2/noweobowiazkipredsioborcownowejustawieosystemiehandluuprawnieniamidoemisji\\_gazowcieplarnianych\\_cire\\_040920151.pdf](http://www.cire.pl/pliki/2/noweobowiazkipredsioborcownowejustawieosystemiehandluuprawnieniamidoemisji_gazowcieplarnianych_cire_040920151.pdf).

<sup>65</sup> EUI Florence, *Study on the Division of Powers between the European Union, the Member States, and Regional and Local Authorities*, Florence, pp. 233-241.

regulations in Poland, different administrative authorities of the national and sub-national/regional level are involved in the process of the EU ETS enforcement<sup>66</sup>.

- Ministry of Environment – main supervisor of the system, responsible for law implementation/transposition;
- KOBIZE – central Competent Authority (registry, allocation, annual emission reports);
- Network of regional administration institutions (assessment and issuance of permits and accepting of monitoring plans);
- Chief Inspectorate of Environmental Protection (GIOŚ) and sixteen Voivodship (Regional)<sup>67</sup> Inspectorates for Environmental Protection (WIOŚ) (irregular situations, financial fines, etc.);
- Polish Centre for Accreditation (PCA) – supervision of verifiers accreditation process<sup>68</sup>.

The EMA of 17 July 2009 established the National Centre for Emissions Management (hereinafter: ‘National Centre’ or ‘KOBIZE’)<sup>69</sup> which took over the tasks of the National Administrator of Emissions Trading System (KASHUE) established under the abovementioned ETA of 22 December 2004<sup>70</sup>.

The responsibilities of the National Centre<sup>71</sup>, as established in article 3 of EMA, concern a range of different tasks relating to the operation of the National System for Emission Balancing and Forecasting, including the keeping of the National Database on Emissions of Greenhouse Gases and Other Substances<sup>72</sup>, keeping the National Registry of the Kyoto Unit and keeping the list of the Joint Implementation projects, and drawing up sets of information and reports, in particular for the purposes of the public

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Available at: <http://cor.europa.eu/en/Archived/Documents/4677db29-47fa-4093-b42c-ed34b34092af.pdf> [November 2015].

<sup>66</sup> Article 4-7 ETS Act 2015.

<sup>67</sup> Article 41 item 2 ETS Act.

<sup>68</sup> Questionnaire KOBIZE, received 7 May 2014.

<sup>69</sup> Article 3 EMA.

<sup>70</sup> Article 9 ETA.

<sup>71</sup> Poland’s National Inventory Report, 2013, p. 17, available at: [http://www.kobize.pl/materialy/Inwentaryzacje\\_krajowe/2013/NIR-2013-PL-en.pdf](http://www.kobize.pl/materialy/Inwentaryzacje_krajowe/2013/NIR-2013-PL-en.pdf) [May 2015].

<sup>72</sup> See also Article 6 EMA.

statistics. As regards the administration of the greenhouse gas emission allowance trading scheme, KOBIZE in particular has the following tasks:

- a) keeping the electronic database containing information about installations subject to the scheme necessary for the development of the draft national greenhouse gas allocation plan (...);
- b) keeping the electronic database containing information about aircraft operators (...);
- c) providing opinions on monitoring plans, referred to in article 51(1) of the Act of 28 April 2011 on the greenhouse gas emission allowance trading scheme;
- d) collecting data and performing analyses on the scheme;
- e) developing of the draft national greenhouse gas allocation plan for the installations subject to the scheme;
- f) compiling reports on the scheme in terms of participation in the system of installations and aircraft operators;
- g) providing explanations, preparing information and training materials;
- h) cooperation with public administration authorities and fulfilment of international commitments;
- i) keeping the list of the entities authorised to verify the reports specified in the Act of 28 April 2011 on the greenhouse gas emission allowance trading scheme prepared by the aircraft operators and installation operators;
- j) conducting emission allowance;
- k) providing opinions on draft legal acts and documents concerning the scheme;
- l) drawing up lists of the installation operators and aircraft operators who infringed their obligations related to the participation in the scheme, and forwarding them to the Minister responsible for the environment.

KOBIZE also keeps the list of the entities authorised to verify the reports.

According to article 4 of EMA, the performance of duties of the National Centre is a responsibility of the Institute for Environmental Protection in Warsaw. It is a research institute supervised by the Minister of the Environment under the provisions of chapter 7 of the Act of 30 April 2010 on Research Institutes<sup>73</sup>. The Minister responsible for the environment supervises the performance of its responsibilities by the National Centre<sup>74</sup>.

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<sup>73</sup> Journal of Law of 2010, No 96, item 618 with amendments.

<sup>74</sup> Article 5 item 1 EMA.

By 31 January of each year, the National Centre submits a report on the performance of its responsibilities to the Minister<sup>75</sup>. Where the report is incomplete or gives rise to objections, the Minister may request that the report should be supplemented or additional clarification should be provided<sup>76</sup>. If by the set date the National Centre fails to supplement the report or to submit the clarification required, or if the report submitted still gives rise to objections, the Minister may order to carry out an inspection in the scope of the tasks performed by the National Centre<sup>77</sup>. If any significant irregularities are found in the scope of the performance of its responsibilities by the National Centre, the Minister may dismiss the Director of the Institute of Environmental Protection<sup>78</sup>.

## 4.2. National Allocation Plans

National allocation plans (NAP) determined – during the trading period 2008-2012<sup>79</sup> – for each Member State the ‘cap’ or limit on the total amount of CO<sub>2</sub> that installations covered by the EU ETS could emit, and set out how allowances would be allocated to individual installations. The National plans had to be consistent with the EU’s and Member States’ Kyoto commitments, with the actual verified emission levels reported in the Commission’s annual progress reports and with the technological potential to reduce emissions. Article 13(1) of ETS Act determines what issues should be regulated in the national allocation plans.

The acceptance of the Polish NAPs by the European Commission was beset by long procedural disputes, including proceedings before the Court of First Instance of the European Community<sup>80</sup>. According to Karski: this ‘bad experience with the community trading system negatively influenced the reception of this extremely interesting market-based instrument by generating general reluctance towards climate issues. The consequence has been a destabilization of the EU ETS and thus of this part of emission

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<sup>75</sup> Article 5 item 2 EMA.

<sup>76</sup> Article 5 item 3 EMA.

<sup>77</sup> Article 5 item 4 EMA.

<sup>78</sup> Article 5 item 5 EMA.

<sup>79</sup> See, for instance, Article 12 item 1 of the Polish ETS Act.

<sup>80</sup> Judgement of the Court of First Instance, 23 September 2009, in Case T-183/07 *Poland vs. Commission*, OJ C 267 of 07 November 2009.

reduction law in Poland. Emission trading is associated with constant changes, low predictability and unclear rules<sup>81</sup>.

### 4.3. GHG Emissions Permit

Entities using installations covered by the system are obliged to obtain a permit for emissions of greenhouse gases<sup>82</sup> from the relevant authority at the level of sub-national government. In Poland, the body competent for issuing permits to take part in the trading scheme is the starost (county governor), or in the case of plants incorporating an installation which qualifies as an undertaking likely to have a significant impact on the environment – the competent marshal of the voivodship<sup>83</sup>. As mentioned, there are 16 voivodships and 314 (380) poviats in Poland. Permits are granted for a maximum period of 10 years<sup>84</sup>.

The permit is one of the tools that helps supervise the system, but it is up to an independent decision of each regional administration institution if they conduct inspection during the process of issuing the permit<sup>85</sup>. The starost and the marshal of the voivodship are supervised by the Ministry of Environment and are not directly linked to, or accountable to, the monitoring and compliance system of the National Center (KOBIZE) and the Regional Inspectorates for Environmental Protection (Wojewódzki Inspektor Ochrony Środowiska). This structure makes the control on the issuance of GHG permits rather weak as became clear in e.g. the case of the Łęczna coal plant near the Ukrainian border<sup>86</sup>. In this case permits were issued for the coal plant worth of €33-million of free allowances. Under EU rules, exemptions from the ETS until 2020 – ‘10 c derogations’ – can only be granted to power plants if their investment process was ‘physically

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<sup>81</sup> L. Karski, *supra* note 8, at p. 238.

<sup>82</sup> Article 41 item 1 ETS Act; Article 52 item 1 ETS Act 2015.

<sup>83</sup> Article 41 item 2 ETS Act; Article 52 item 2 ETS Act 2015.

<sup>84</sup> Article 41 item 3 ETS Act; Article 52 item 3 ETS Act 2015.

<sup>85</sup> Questionnaire KOBIZE, received 7 May 2014.

<sup>86</sup> See for instance, A. Nelsen, *Polish ‘ghost’ coal plants ignite emissions trading outrage*, EurActiv, Guardian Environment Network, 11 July 2012, available at: <http://www.theguardian.com/environment/2012/jul/11/coal-energy> [May 2015], and A. Łakoma, *Przekonać nie tylko Brukselę*, Rzeczpospolita, 2 August 2011, available at: <http://www.rp.pl/artykul/696027.html> [May 2015].

initiated' before 31 December 2008, and if their greenhouse gas permits were issued before 30 June 2011. However, since 2008 there has been no visible evidence of any construction work at the site in Łęczna<sup>87</sup>, and in July 2015 it became eventually clear that the whole project was cancelled. Engie, the energy giant part-owned by the French government, announced it was pulling out of the controversial Łęczna coal-fired power plant Lublin<sup>88</sup>. Marek Józefiak of Polish Green Network welcomed this development as “a signal for other energy companies operating in Poland. Changes in recent years show that the future of European energy potential lies in the renewable energy sources”<sup>89</sup>.

Under article 3(16) of ETS Act<sup>90</sup>, a permit is an administrative decision allowing for emission of greenhouse gases from an installation covered by the system and defining duties of an entity using the installation as regards control<sup>91</sup>. The lack of such a permit means that using an installation in the area of emission of greenhouse gases covered by the system during the accounting period is not permitted. Where the entity using the installation does not possess a permit a penalty of 50.000 Euro can be imposed<sup>92</sup>. So far, this has never happened.

#### 4.4. The Monitoring Plan

According to article 56 of ETS Act<sup>93</sup>, an entity using an installation covered by the system is obliged to draw up an emission monitoring plan. The monitoring plan goes through both ex-ante and ex-post control. Ex-ante control is conducted by regional administration institutions [see under *GHG Emissions Permits*] during the process of acceptance and

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<sup>87</sup> Questionnaire and interview with ClientEarth, 30 April 2014.

<sup>88</sup> See, *France's Engie quits plans to build power plant*, 15.07.2015, <http://www.thenews.pl/1/12/Artykul/213815,Frances-Engie-quits-plans-to-build-power-plant> [October 2015].

<sup>89</sup> *Poles apart over coal as new government sweeps to power*, <http://tckctck.org/2015/10/poles-apart-over-coal-as-new-government-sweeps-to-power/> [1.11.2015].

<sup>90</sup> Article 3 point 25 ETS Act 2015.

<sup>91</sup> M. Jaś, *supra* note 3, at p. 114.

<sup>92</sup> Article 72 ETS Act. Compare with Article 102 ETS Act 2015: 50.000 Polish Zloty.

<sup>93</sup> Article 78 ETS Act 2015.

issuing of a monitoring plan<sup>94</sup>. Ex-post control of a monitoring plan and all related monitoring procedures is performed annually by verifiers during the verification process in accordance with articles 16, 17 and 27 of ETS Act [see under *Verification*]<sup>95</sup>. The entity using an installation is bound to change the plan<sup>96</sup>, inter alia, in the case the monitoring methodology applied has changed or contains mistakes<sup>97</sup>.

Directive 2008/101/EC of 19 November 2008 amended Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community. This incorporation of aviation emissions in the EU ETS is one of the major developments in the EU ETS Phase III. Consequently, one of the new aspects in ETS Act is the regulation of the functioning of the scheme of aircraft operations performed by aircraft operators<sup>98</sup>.

## 4.5. Reporting

Every year, before 31 March, entities managing installations and aircraft operators have the obligation to submit<sup>99</sup> to the National Centre a verified report on the amount of GHG emission. The assessment by the National Centre includes an evaluation of completeness, correctness of calculation, compliance with MRR requirements and monitoring methodology approved in a monitoring plan<sup>100</sup>. The National Centre contacts the entity or operator for further explanations where it finds any irregularities. It can also require

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<sup>94</sup> Article 56 item 1 ETS Act; Article 78 ETS Act 2015.

<sup>95</sup> Questionnaire KOBIZE, received 7 May 2014; Article 84, 86 ETS Act 2015.

<sup>96</sup> Article 56 item 2 and 3; Article 77 item 1 and 2 ETS Act 2015. In 2012 operators changed their monitoring plans often – 576 times – to be in line with new requirements included in the Monitoring and Reporting Regulation. Questionnaire received from KOBIZE, 7 May 2014.

<sup>97</sup> Article 58 item 2 ETS Act; Article 83 ETS Act 2015. Detailed rules for controlling are set out by the Regulation of the Minister of the Environment of 12 September 2008 on means of monitoring amounts of emission of substances covered by emission allowance trading scheme, Journal of Laws of 2011, No154, item 914.

<sup>98</sup> Article 51, 52, 53, 55 ETS Act; Article 74-77, 81 ETS Act 2015.

<sup>99</sup> Also see Article 8 EMA regulating the submission and uploading of the report in the National Database.

<sup>100</sup> Questionnaire KOBIZE, received 7 May 2014.

adjustments to be made in the report within 30 days<sup>101</sup>. If the deadline of 31 March is not met, the National Centre blocks the operator's or entity's account in the National Registry<sup>102</sup>.

In case of detection of noncompliance (lack of emission report, emission report submitted after the deadline, lack of surrendered allowances in registry, number of surrendered allowances is smaller than annual emission)<sup>103</sup> the National Centre draws up a list of these cases and forwards it to the Regional Inspectorates for Environmental Protection<sup>104</sup> by 15 May, and to the Minister of Environment. The latter publishes the list in the Public Information Bulletin (Biuletyn Informacji Publicznej)<sup>105</sup>.

Noncompliance may finally lead to the imposition, by the Regional Inspectorates for Environmental Protection, of financial fines of up to 10.000 Euro – an amount considered to have a deterrent effect<sup>106</sup>. Where the National Centre has not been notified in due time of the fact that an installation has stopped to fulfil the requirement of the system, a penalty of 5000 Euro can be imposed<sup>107</sup>. So far, this has never occurred.

## 4.6. Verification

The institution responsible for accreditation of verifiers in Poland is the Polish Centre for Accreditation (a member of European Co-operation for Accreditation). Currently 8 companies are accredited by PCA as verifiers. In addition, there are a number of verifiers accredited by national accreditation bodies in other Member States that provide their

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<sup>101</sup> Article 62 item 4-7 ETS Act; Respectively, Article 86 item 5, 8-10 ETS Act 2015.

<sup>102</sup> Article 62 item 1 and 3 ETS Act; Article 80 item 3, 84 item 1-2, 86 item 1 ETS Act 2015.

<sup>103</sup> Article 66 item 1 ETS Act; Article 94 item 1 ETS Act 2015 Questionnaire KOBIZE, received 7 May 2014.

<sup>104</sup> Different locations across Poland, see <http://www.gios.gov.pl/pl/inne/wojewodzkie-inspektoraty-ochrony-srodowiska> [October 2015].

<sup>105</sup> Articles 66-67 ETS Act; Articles 94-95 ETS Act 2015.

<sup>106</sup> Article 70 item 1 ETS Act; Article 105 item 1: 50.000 Polish Zloty.

<sup>107</sup> Article 70 item 2 ETS Act (No equivalent in ETS Act 2015).

services in Poland. The website of the National Centre contains a register of accredited verifiers<sup>108</sup>.

Articles 59-62 of ETS Act<sup>109</sup> (42-48 ETA for First and Second Phase) set out general requirements regarding the verification of the annual report and accreditation of the auditors<sup>110</sup>. Entities using installations and aircraft operators pay the costs of the verification of the reports<sup>111</sup>.

Remarkably, all annual reports submitted between 2007 until 2012 to the National Centre have received positive feedback from the verification<sup>112</sup>. Moreover, in the years 2008-2012, a special team by the National Centre carried out an analysis of the correctness of the calculation and checked compliance between annual emission reports and monitoring requirements included in permits for participation in the EU ETS (the methods of monitoring and reporting)<sup>113</sup>. During these years no situations were reported where the National Centre had to instruct the registry administrator to correct the annual verified emissions for the previous year for any installation(s) to ensure compliance with the detailed requirements established by the Member State pursuant to Annex V to Directive 2003/87/EC<sup>114</sup>.

The National Centre confirms that the non-compliance level is very low in Poland and adds that cases of non-compliance are usually related to meeting the deadline for the submission of annual emission reports. This is often due to the fact that there are not enough accredited verifiers on the market<sup>115</sup>.

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<sup>108</sup> Article 3 EMA; 60 ETS Act; Article 3 point 23, 84 item 1 ETS Act 2015. Questionnaire KOBIZE, received 7 May 2014.

<sup>109</sup> Article 80 item 3 – 88 ETS Acts 2015.

<sup>110</sup> The Regulation of the Minister for the Environment of 6 February 2006 concerning the conditions to be met by auditors authorized to verify annual reports, Journal of Laws of 2006, No 23, item 176, available at: [http://www.mos.gov.pl/g2/big/2009\\_04/55ef9e226a1808b07493ab61150e9562.pdf](http://www.mos.gov.pl/g2/big/2009_04/55ef9e226a1808b07493ab61150e9562.pdf) [May 2015].

<sup>111</sup> Article 61 ETS Act; Article 84 item 5 ETS ACT 2015.

<sup>112</sup> Report for the European Commission on the implementation of Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading (hereinafter: 'Article 21 report') by Poland for the years 2007 – 2012. Available at <http://cdr.eionet.europa.eu/> [May 2015].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Questionnaire KOBIZE, received 7 May 2014.

## 5. Ensuring Compliance

### 5.1. Inspection

As mentioned above, where the National Centre detects cases of non-compliance (lack of emission report, emission report submitted after the deadline, lack of surrendered allowances in registry, number of surrendered allowances is smaller than annual emission)<sup>116</sup> it draws up a list and forwards it to the relevant Regional Inspectorate for Environmental Protection for further factual control<sup>117</sup>. On the basis of this information the Regional Inspectorates for Environmental Protection plan and conduct their inspection activities. Inspection is considered 'a useful tool that could be used in more problematic cases (like lack of an emission report in case of cessation, bankruptcy, closures etc). However, due to high cost and capacity limitations it is up to an individual decision of each institution when and how to organize the inspection'<sup>118</sup>.

If the Regional Inspectorate for Environmental Protection finds any irregularities affecting the determination of the amount GHG emitted he determines the factual amount of the emission and notifies the National Centre<sup>119</sup>. The excess emissions penalty is 100 Euro for each tone of CO<sub>2</sub> equivalent emitted for which the operator did not surrender allowances by 30 April<sup>120</sup>. So far, no penalties have been imposed.

### 5.2. Sanctions

The system for effective sanctions safeguarding the performance of the obligations imposed by the law is regulated in chapter 8 (Articles 51-67

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<sup>116</sup> Article 66 item 1 ETS Act; Article 94 item 1 ETS Act 2015. Questionnaire KOBIZE, received 7 May 2014.

<sup>117</sup> Article 63 item 1-3; 87 item 1-2 ETS Act 2015; Chapter 3 National Act of 20 July 1991 Law on environmental inspectorate, Journal of Laws of 2007, No 44, item 287, with later amendments.

<sup>118</sup> Questionnaire KOBIZE, received 7 May 2014.

<sup>119</sup> Article 63 item 5-6 ETS Act; Article 87 item 6-7 ETS Act 2015.

<sup>120</sup> Article 71 ETS Act; Article 104 ETS Act 2015.

of ETS Act)<sup>121</sup> on Monitoring and Balancing and in chapter 11 (Articles 70-77 ETS Act)<sup>122</sup> on financial sanctions of ETS Act. In general possible sanctions are the following: blockade of an account in the registry (in case of lack of the report at the end of March); inspection and estimation of annual emission by a regional competent authority (in case of lack of the report or serious misstatements); financial fines (in case of lack of the permit, lack of the annual report or when insufficient number of allowances were surrendered); publication of company's name in official journal ("name and shame")<sup>123</sup>.

As mentioned above, the National Centre assesses the data and figures presented in the annual report and contacts the entity or operator for further explanations where it finds any irregularities. It can also require adjustments to be made in the report within 30<sup>124</sup> days<sup>125</sup>. The total number of permits that were updated during the reporting period because of a change in the nature or functioning, or extension, of installations made by operators as specified in article 7 of Directive 2003/87/EC was in 2007: 347, in 2008: 317, in 2009: 841, in 2010: 286, in 2011: 405, in 2012: 985<sup>126</sup>.

If the deadline of 31 March is not met, the National Centre blocks the operator's or entity's account in the National Registry<sup>127</sup>. The total number of allowances in the accounts blocked in 2009 was: 13 661 412 allowances for 55 of installations. In 2010: 4 476 835 for 34 installations. In 2011: 1 651 925 Mg CO<sub>2</sub> allowances for 18 installations. In 2012: 92 472 Mg CO<sub>2</sub> + 3000 ERUs for three<sup>128</sup> installations<sup>129</sup>.

The National Centre also draws up a list of entities managing installations and aircraft operators who did not submit a report in due time and forwards

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<sup>121</sup> Article 74-97 ETS Act 2015.

<sup>122</sup> Article 102-109 ETS Act 2015.

<sup>123</sup> *Id.*

<sup>124</sup> According to Article 86 item 10 ETS Act 2015: 14 days.

<sup>125</sup> Article 62 item 4-7 ETS Act; Article 86 item 5, 8, 9, 11 ETS Act 2015.

<sup>126</sup> 'Article 21 reports' by Poland for the years 2007 – 2012.

<sup>127</sup> Article 62 item 1 and 3 ETS Act; Article 87 item 1-2 ETS Act 2015.

<sup>128</sup> In 2012 KOBIZE blocked 3 accounts in the registry as a sanction for incompliance. Some other accounts were temporary blocked for missing the deadline for submission of the annual emission report or when some mistakes were found in the emission report during the assessment in KOBIZE. Those accounts were later unblocked when the annual emission reports were submitted or when the corrected versions of the annual emission reports were provided. Source: Questionnaire KOBIZE, received 7 May 2014.

<sup>129</sup> 'Article 21 reports' by Poland for the years 2007 – 2012.

these lists to the Regional Inspectorates for Environmental Protection and to the Minister of Environment. The latter publishes the list in the Public Information Bulletin<sup>130</sup>.

### 5.3. Financial Penalties

Financial penalties are imposed by a Regional Inspectorate for Environmental Protection as executive orders. As of 2011 the fines have increased considerably<sup>131</sup>. Regional Inspectorates for Environmental Protection are authorised to impose penalties in situations mentioned in articles 70-72 of ETS Act: A penalty of 10.000 euro for failure to submit a verified report on emissions in due time (article 70 (1))<sup>132</sup>; A penalty of 5.000 euro for the omission to notify changes to the installation (article 70 (2))<sup>133</sup>; A penalty of 50.000 euro for running an installation without permit (article 72 (1))<sup>134</sup>; An excess emissions penalty of 100 Euro for each tone of CO<sub>2</sub> equivalent emitted for which the operator did not surrender allowances by 30 April (article 71)<sup>135</sup>.

Before 15 February, the Regional Inspectorates for Environmental Protection inform the National Centre and the National Funds about the amounts imposed by way of penalty; the names of the users of the installation or the airplane operators, and the type of infringement<sup>136</sup>. With regard to penalties for airplane operators, abovementioned information is also forwarded to the Minister of Environment<sup>137</sup>.

There is a high compliance rate in Poland. According to the National Centre, the financial fines are quite high so operators try to do everything on time. In addition to that, the National Centre sends reminders before

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<sup>130</sup> Articles 66-67 ETS Act; Articles 94-95 ETS Act 2015.

<sup>131</sup> See also the sanctions as established in the Article 98-105 ETS Act 2015.

<sup>132</sup> In the period 2006-2010: no penalty.

<sup>133</sup> In the period 2006-2010: no penalty.

<sup>134</sup> In the period 2006-2010: regional environmental protection inspector can impose a fine.

<sup>135</sup> In the period 2006-2010: the same penalty.

<sup>136</sup> Article 76 ETS Act (No equivalent in ETS Act 2015).

<sup>137</sup> Article 77 ETS Act; Article 109 ETS Act 2015.

each important deadline<sup>138</sup>. Between 2007 and 2012 no penalties were imposed<sup>139</sup>.

## 5.4. Other Compliance Mechanisms

Permanent assistance is available in Poland for companies that have questions regarding their obligations under the EU ETS. KOBIZE as a central Competent Authority provides help for both companies covered by EU ETS and other institutions. Those support activities include:

- Helpdesk (including allocation, MRV, registry, legal);
- Annual workshops for verifiers (together with PCA);
- Dedicated workshops (introduction of new MRV requirements or templates);
- Preparation of guidelines, templates and examples or translation of EU level support documentations.

Further, representatives of Ministry of Environment or KOBIZE are participating actively in all official Technical Working Groups (benchmarking, monitoring & reporting, accreditation & verification, aviation) and many additional forums like Compliance Forum task forces (TF MR, TF AV, TF Aviation). In addition a KOBIZE representative is a Member of the Compliance Forum Steering Committee<sup>140</sup>.

## 6. Concluding Observations

The process of centralization and harmonization of the European Union Emission Trade System does not encompass the entire compliance cycle: national competent authorities remain responsible for inspection and sanctioning, and are in charge of ensuring compliance of the measurement, reporting and verification (MRV) process. The effectiveness and reliability of the EU ETS partly depends on the effort of each of the 31 participating States. A lack of compliance in one or a few Member States may harm

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<sup>138</sup> Questionnaire KOBIZE, received 7 May 2014.

<sup>139</sup> 'Article 21 reports' by Poland for the years 2007 – 2012.

<sup>140</sup> Questionnaire KOBIZE, received 7 May 2014.

the functioning of the ETS in the entire EU. This article aimed to assess to what extent Poland, in a climate of strong political resistance against the EU ETS system, has succeeded, first, to ensure the legal implementation of the EU ETS system in Polish law and policy and, second, to practically realize an effective and reliable monitoring and enforcement system.

As regards the legal implementation of the EU ETS system in Polish law and policy it can be concluded that the transposition in Polish law of Directive 2003/87, including the establishment of several institutions for the monitoring and compliance of the EU ETS, has occurred correctly<sup>141</sup>. However, the adoption by Parliament of a legal act fully transposing Directive 2009/29/EC took place only in June 2015<sup>142</sup>. Whereas this delayed transposition of this Directive slows down the realization of the Third Phase of the EU ETS in Poland, it does not directly affect the functioning of the Polish EU ETS monitoring and compliance system and institutions as such.

With regard to the realization of an effective and reliable EU ETS monitoring and compliance system in Poland, it can be concluded that the control over permit issuance is a weak point in the system. One of the reasons might be the deficient connection between the ex-ante monitoring and compliance conducted by regional administrative authorities who issue permits for GHG emission and the ex-post monitoring and compliance by the National Centre and the Regional Inspectorates for Environmental Protection.

Further, the fact that between 2007 and 2012 no fines were imposed at all<sup>143</sup> is remarkable, but can probably be attributed to the deterrent effect of the high fines for the different infringements; to the fact that operators and entities have ample opportunity to update their permits, and to the fact that the National Centre sends reminders before each important deadline and regularly blocks the account of an operator or entity in the National Registry. However, the lack of accredited verifiers on the market has already resulted in some practical problems and might become a point of concern for the functioning of the monitoring and compliance system in the Third Phase (until 2020) and afterwards. In general it can be concluded that, so

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<sup>141</sup> Questionnaire ClientEarth, received 26 April 2014.

<sup>142</sup> Act of 12 June 2015 on the greenhouse gas emission allowance trading scheme, Journal of Laws of 2015, item 1223. Available at: <http://www.oigr.pl/pliki/legislacyjne/22-05-2014.pdf> [1.11.2015].

<sup>143</sup> *Id.*

far<sup>144</sup>, the strong political resistance against the EU ETS system as a whole has not been able to significantly influence the legal implementation of the EU ETS system in Polish law and policy neither has it prevented the practical realization of an EU ETS monitoring and enforcement system. The true litmus test though for functioning of the Polish EU ETS monitoring and compliance system and its institutions will come after 2030, when the privileged position of the Polish energy companies will come to an end<sup>145</sup>.

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<sup>144</sup> See however: *New Polish Government Opposes EU Climate Deal*, 26 October 2015, <https://atlasmonitor.wordpress.com/2015/10/26/new-polish-government-opposes-eu-climate-deal/> [November 2015]. *Poland elects eurosceptic party opposing EU emission laws*, 26 October 2015, <http://carbon-pulse.com/poland-elects-eurosceptic-party-opposing-eu-emission-laws/> [1.11.2015].

<sup>145</sup> European Council (23 and 24 October 2014) *Conclusions on 2030 Climate and Energy Policy Framework* par. 2.5, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/145356.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/145356.pdf) [May 2015].

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