

# Decision in principle on the construction of a nuclear energy facility as a form of securing the public interest

## Abstract

The decision in principle regarding the construction of a nuclear energy facility should, according to the legislator's will, serve to secure the public interest. This decision is a carrier of this interest and contains various values related to nuclear energy. The purpose of this study is to demonstrate the truthfulness of these statements. There are normative premises for issuing a basic decision, and these are the Atomic Law Act and the Act specifying the preparation and implementation of investments in the field of nuclear energy. These legal acts are based on the premise of safeguarding the public interest, ensuring adequate and optimal energy supplies, and achieving the appropriate quality of supply, distribution, and use of nuclear energy. The decision in principle initiates the preparatory activities for the construction of a nuclear energy facility and, most importantly, paves the way for the legal issuance of other decisions and the undertaking of related legal actions.

**KEYWORDS:** decision in principle, nuclear energy, public interest, safety, nuclear energy facility, nuclear power plant

EWA PRZESZŁO – assistant professor, University of Silesia,  
ORCID – 0000-0002-9649-4134, e-mail: eprzeszlo@wp.pl

# 1 | Introduction

The decision in principle on the construction of a nuclear power facility should serve to ensure the public interest and be a form of its expression. However, this requires that this form of action by a public administration body, such as the minister responsible for energy, be embedded not only in the context of the procedure for the preparation and realization of investments in nuclear power facilities (Act of June 29, 2011 on the preparation and realisation of investments in nuclear power facilities and accompanying investments (hereinafter: investment law)<sup>[1]</sup> but, above all, in relation to the Atomic Law of November 29, 2000 (hereinafter: Atomic Law)<sup>[2]</sup> delineating the scope and meaning of the public interest.

The legal construction of the decision in principle was legitimately introduced in a law of a procedural nature, i.e. the investment law, while the criterion for issuing or refusing to issue this decision, that is the public interest, is closely related to the Atomic Law, containing substantive, functional and protective norms. In the latter, this interest is perceived mainly as the need to ensure safety, which seems to be related both to the creation and development of the nuclear energy sector and to its operation, ensuring concrete economic and social effects.

The use of nuclear energy for primarily economic purposes has been and continues to be considered a necessity and a need of a modern state, but on the other hand it raises a number of concerns and doubts related to this use, especially with regard to the question of ensuring safety<sup>[3]</sup>. The need for the economic use of nuclear energy and the construction of appropriate energy facilities is articulated primarily by the state authorities as part of their energy policy, while the public and its more or less formalized groups seek recognition of their reasons for creating safe conditions for nuclear energy production. It is advisable for these needs to be reflected

<sup>1</sup> Consolidated text: Journal of Laws of 2021, item 1484, as amended.

<sup>2</sup> Consolidated text: Journal of Laws of 2023, item 1173.

<sup>3</sup> See e.g. Tomasz Młynarski, *Energetyka jądrowa wobec globalnych wyzwań bezpieczeństwa energetycznego i reżimu nieproliferaacji w erze zmian klimatu* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2016), 29-54, 65-1178, Paweł Gajda, Wojciech Gałosz, Urszula Kuczyńska, Anna Przybyszewska, Adam Rajewski, Łukasz Sawicki, *Energetyka jądrowa dla Polski* (Warszawa: Instytut Sobieskiego, 2020), Press release of the Polish Economic Institute entitled „Elektrownie jądrowe zapewnią Polsce prawie 40 proc. Zapotrzebowania na energię i podniosą PKB o ponad 1 proc.”, published 17 August 2022. [https://pie.net.pl/wp-content/uploads/2022/08/Energetyka-jadrowa\\_komunikat-prasowy.pdf](https://pie.net.pl/wp-content/uploads/2022/08/Energetyka-jadrowa_komunikat-prasowy.pdf).

in the law and to be given a normative dimension, since they are related to the public interest in the broadest sense; in the case of the public authorities, it refers to measures aimed at ensuring an optimal and rational supply of electricity to the economy and consumers, and for the public and its groups, it refers to the creation of conditions for the use of this energy at an appropriate level of quality<sup>[4]</sup>.

For many years, the Polish legislator has been creating the legal basis for organizational, investment and economic measures aimed at the creation of a nuclear power sector, both through the construction of such a facility and its infrastructure, as well as ensuring its functioning. However, it took a long time for these regulations and their individual institutions to be applied in practice<sup>[5]</sup>.

## 2 | Public interest in the area of nuclear power generation and operation

It seems that in the legal area, but also in the economic and social area of energy, including nuclear energy, it is not necessary, because of its obviousness, to justify the existence of the category of public interest. The public interest or the clauses or concepts related to it are referred to in the legal acts creating the specified legal area. Here, the category is empowered both by the institution of the state and by society, and at the same time both entities, often together, but just as often separately, articulate (express) the public interest, trying to adapt various terms to it. The public interest usually means referring to the values adopted and

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<sup>4</sup> See in this matter, e.g. Marta Sobczuk, „Energetyka jądrowa jako przejaw realizacji zasady zrównoważonego rozwoju” *Białostockie Studia Prawnicze*, No. 4 (2013): 295-302, and also Angelina Sarota, „Państwo i społeczeństwo. Uwarunkowania prawne i procesy decyzyjne. Energetyka jądrowa w Polsce” *Kontrola Państwowa*, no 4 (2018): 572-590.

<sup>5</sup> See on this issue: Tomasz R. Nowacki, „Nuclear power of the Vistula River. Law and Policy in Shaping Energy Future of Poland” *Prawo i Więź*, No. 3 (2020): 182-209 and idem, „Prawo energii jądrowej w Polsce w obliczu wdrożenia energetyki jądrowej. Wybrane wyzwania i potencjalne obszary zmian” *Bezpieczeństwo Jądrowe i Ochrona Radiologiczna. Biuletyn Informacyjny Państwowej Agencji Atomistyki*, No. 3 (2024): 5-19.

accepted by the designated entities, whereby the State, if it is assumed to be an organization embodying society, associates the public interest with acting for the „common good”<sup>[6]</sup>.

The axiological concept of the public interest implies that this interest is linked to values and that it is the public interest that determines the scope and content of the values considered worthy of protection by the State and the community concerned, that constitutes the limit of the permissible interference of public authority in social and economic relations and in civil and economic liberties, and at the same time constitutes the limit of the freedom of action of the individual and the freedom of economic activity.

It is also possible to see and specify the public interest from the point of view of the objective that could or should be pursued and from the point of view of the needs articulated, socially determined or resulting from the social and economic policies outlined by the state authorities<sup>[7]</sup>.

The values associated with the public interest include, in particular, justice, equity, freedom, security, state sovereignty, public health, the maintenance of financial equilibrium, the protection of consumers, service users and employees, the protection of the natural and urban environment, economic and social policy objectives and citizens' trust in public authorities, human and civil rights, and many others of a normative and extra-normative nature, related to the activities of the State and the functioning of society, which are related to the economic sphere or are not related to the economic sphere<sup>[8]</sup>.

The public interest is a category (value) that is recognized, fully accepted by the state, introduced into the normative system and at the same time protected by the state and its institutions. The formula of public interest should take into account the objectified needs of the general public or local communities. However, it is usually the political will – the manifestation

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<sup>6</sup> See Anna Młynarska-Sobaczewska, „Dobro wspólne jako kategoria normatywna” *Acta Universitatis Lodziansis, Folia Iuridica*, No. 69 (2009): 61-72, Irena Lipowicz, „Dobro wspólne” *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No. 3 (2017): 17-31.

<sup>7</sup> See Eliza Komierzyńska, Marian Zdyb, „Klauzula interesu publicznego w działaniach administracji publicznej” *Annales Universitatis Mariae Curie-Skłodowska. Sectio G. Ius*, No. 2 (2016): 161-179.

<sup>8</sup> Jolanta Itrich-Drabarek, „Interes publiczny”, [w:] *Encyklopedia administracji publicznej*, red. Jolanta Itrich-Drabarek (Warszawa: Dom Wydawniczy Elipsa, 2018). [http://encyklopediaap.uw.edu.pl/index.php/Interes\\_publiczny](http://encyklopediaap.uw.edu.pl/index.php/Interes_publiczny), see also Andrzej Powołowski, Ewa Przeszło, „Public interest in the social economy” *Studia Iuridica*, vol. XLVIII (2023): 118-128 and literature provided there on the concept of public interest.

of the creation and application of law and, consequently, the manifestation of state governance – that determines what is public interest and what is not. The understanding of the public interest is reflected in the applicable law and, due to the clausal nature of the term, also in the interpretation of the law.

Pursuant to the content of Article 20 in conjunction with Article 22 of the Constitution of the Republic of Poland<sup>[9]</sup> and in line with the constitutional principle of a social market economy with a view to the public interest, the market (commercial) economy should be appropriately linked to social needs. It should be noted that the role of the state is to act as a „super-arbitrator” and at the same time as a decision-maker, aiming to reconcile the various types of interests and, at the same time, the various opposites often appearing in areas of the functioning of society and the economy. The basis of the public interest is transparency in decision-making, which often means balancing conflicting interests<sup>[10]</sup>.

This role of the state means, among other things, creating the conditions for all those who, in view of their objectives, should undertake various activities, both those who create the economy in the personal and material sense and those who benefit from the effects of the economic mechanism and at the same time are members of the entire community and at the same time members of local, professional and other communities. The objectives of the state and these communities and their implementation are in close correlation with the public interest<sup>[11]</sup>.

It should further be noted that in a situation where it is possible to limit the freedom, and thus narrow the area of rights of economic (including social) actors and thus their autonomy and freedoms, it should consequently be possible to support these actors, in accordance with the content of the principle of the social market economy. Depriving entrepreneurs and other economic actors of a certain degree of their freedom on the basis of a premise of public interest therefore justifies providing them with support, also in the public interest. This support should also be based on

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<sup>9</sup> Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, as amended.

<sup>10</sup> See e.g. Andrzej Powałowski, „Społeczna gospodarka rynkowa w prawie polskim” *Gdańskie Studia Prawnicze*, vol. XXXVII (2017): 51-62.

<sup>11</sup> See Andrzej Powałowski, „Wsparcie dla przedsiębiorców na gruncie prawa”, [in:] *Wsparcie dla przedsiębiorców, aspekt prawny, ekonomiczny i społeczny*, ed. Andrzej Powałowski, Marek Szczepaniec, Anna Kociołek-Pęksa (Warszawa: C.H. Beck, 2021): 1-61.

the premise of the public interest and entail the need to take into account simultaneously, equally and proportionately, the interest of the economic actors associated with the free market and to combine it with the public (social) interest<sup>[12]</sup>. This is evident in the areas of operation of infrastructure sectors, including the energy sector, hence this type of problem will arise in the sphere of nuclear energy<sup>[13]</sup>.

At the same time, it is not known whether the public interest is identical with the social interest and, consequently, whether restrictions on the freedom of economic activity made in the public interest will be consistent with the social interest in the area of the functioning of the economy<sup>[14]</sup>. In any case, it is impossible to give an answer to the question posed in this way, since the public interest can only be an implicit category, possibly presumed on the part of the state, whereas it can be expressed and defined in a specific situation, at a specific time, by society or its group. None of the categories of interests indicated is defined and they are not distinguished under the Polish Constitution. For, as a matter of principle, the state may consider the realisation of various activities and the pursuit of also various goals to be in line with an important public interest, even when these activities and goals, objectively speaking, will not have a public character and when they will not be „important” at all. It is of course possible to justify this “importance” adequately and to link it even to an alleged, artificially created public interest<sup>[15]</sup>.

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<sup>12</sup> On this subject at length in: *Aksjologia publicznego prawa gospodarczego*, ed. Andrzej Powalowski (Warszawa: C.H. Beck, 2022).

<sup>13</sup> See Adam Szafranski, „Wartości związane z prawem sektorów infrastrukturalnych”, [in:] *Aksjologia publicznego prawa gospodarczego*, 119-133.

<sup>14</sup> See on this matter Artur Żurawik, „’Interes publiczny’, ‘interes społeczny’ and ‘interes społecznie uzasadniony’”. An attempt to define the concepts more precisely” *Ruch Prawniczy, Ekonomiczny i Społeczny*, No 2 (2013): 57-69. Marek Szydło also speaks at length on this matter: *Wolność działalności gospodarczej jako prawo podstawowe* (Bydgoszcz-Wrocław: Oficyna Wydawnicza Branta, 2011), 165 onwards.

<sup>15</sup> On the „importance” of the public interest, see Marek Szydło, 186-189, see also judgment of the Constitutional Tribunal of 8 July 2008, ref. no. file K. 46/07, OTK ZU 2008, No. 6A, item 104.

### 3 | Legal prerequisites for the development of nuclear energy under the Atomic Law

The aforementioned Atomic Law specifies (Article 1) that the subject of its regulation is, inter alia, the activity of peaceful use of atomic energy related to actual and potential exposure to ionizing radiation from artificial radioactive sources, nuclear materials, devices generating ionizing radiation, radioactive waste and spent nuclear fuel, as well as the duties of the head of the organizational unit performing such activity. Therefore, the subject of the regulation may be, in particular, economic activities in the field of energy, including nuclear energy<sup>[16]</sup>.

The scope of such activities may include (and at the same time be subject to the regulation of the Atomic Law – see Sections 38 and 39 of Article 1) moreover, the processing of nuclear material – a process or activity aimed at changing the physical or chemical form (conversion) of nuclear material up to obtaining material in the form of nuclear fuel (including reprocessing of spent nuclear fuel) and the processing of radioactive waste containing nuclear material, as well as the processing of radioactive waste, the segregation of waste and the preparation of waste for transportation or disposal.

Such activities have been defined in as much detail as was possible at the time of the enactment of the Atomic Law, i.e. in the absence of experience with the operation of nuclear power in practice. It is the practice, as it were, that compels the legislator to adopt regulations tailored to it and taking into account the realities.

An extremely important area of regulation of the Atomic Law is also the determination of the principles of civil liability for nuclear damage and the principles of fulfillment of international obligations, including those within the European Union, in the field of nuclear safety<sup>[17]</sup>, protection against ionizing radiation and safeguarding of nuclear materials and control of nuclear technology. It is assumed that these are related to the sphere of activities carried out also in the field of nuclear energy.

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<sup>16</sup> See Łukasz Dubiński, „Specustawa jądrowa i prawo atomowe (ocena wybranych planów legislacyjnych)”, *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, No 2 (2022): 84-91. [www.ikar.wz.uw.edu.pl](http://www.ikar.wz.uw.edu.pl).

<sup>17</sup> The Atomic Law defines nuclear safety as „the state achieved by all organizational and technical measures taken to prevent radiation incidents related to activities involving nuclear materials and curbing their effects” (Article 3, point 1).

The Atomic Law also defines (Article 3 (17)) the types of assets used in the course of nuclear power activities. Such components may be a nuclear power plant, a research reactor, an isotopic enrichment plant, a nuclear fuel fabrication plant, a spent fuel reprocessing plant, a spent fuel storage facility, as well as a radioactive waste storage facility directly related to and located on any of these facilities. It seems correct to categorize the aforementioned components as an „undertaking” within the meaning of Article 551 of the Civil Code<sup>[18]</sup>, with Atomic Law using an umbrella term encompassing the components indicated, which is „nuclear facility”. A special form of nuclear facility – as is evident from the above list – is a nuclear power plant, i.e. a facility for generating electricity or heat from nuclear fuel for purposes other than research (Article 3(6f)). Such a facility should, according to the wording of Article 36e of the Atomic Law, be constructed in such a way as to ensure nuclear safety and radiological protection of workers and the public, in accordance with a licence issued by the relevant authority and in accordance with an integrated management system in place.

It is also worth noting that the administrative body performing its tasks<sup>[19]</sup> in matters covered by the subject matter of the normative regulation of the Atomic Law has been specified by the legislation as the one which is competent in matters of nuclear safety and radiological protection. The President of the State Atomic Energy Agency, who is appointed and dismissed by the Prime Minister, has the status of the central body of state administration. If only for this reason, this body acts as a body (authority) taking into account the public interest in the area of its competence.

The aforementioned activities may be undertaken and carried out after the application of measures specified in the regulations to ensure safety and the protection of human life and health, as well as the safety of property and the protection of the environment. In the Atomic Law, the safety clause appears in the regulations both in a general sense and in a specific context, e.g. nuclear security or the previously indicated property security. As for the term itself: „security” it can be presented in the subjective sense, which is related to the provision (and realization) of the supply of fuels and energy for the needs of the country, its economy and society, security in the subjective sense, i.e. in particular spheres of energy, and

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<sup>18</sup> See Magdalena Habdas, „Przedsiębiorstwo w znaczeniu przedmiotowym” *Kwartalnik Prawa Prywatnego*, No. 2 (2002): 333.

<sup>19</sup> See art. 110 of the Atomic Law.



spatial security – regional and national<sup>[20]</sup>. This includes activities related to the construction of nuclear facilities and the handling of nuclear-related assets and the safety of such activities. Although not explicitly defined in the Atomic Law question, it seems that the listed values, (both individually and jointly) make up the category of public interest and at the same time can be identified with this category. At the same time, it may be assumed that in a situation in which the provisions regulating activities from the sphere of nuclear energy refer to these values, this simultaneously means that they indicate the designations of the public interest, making this interest more specific and detailed.

## 4 | Act on the preparation and implementation of investments in nuclear power facilities as a premise for the realization of the public interest

The Law on the Preparation and Execution of Investments in Nuclear Energy Facilities and Associated Investments, enacted in 2011 and amended in 2023, specifies, in addition to the matters covered by its title, the competent authorities in matters relating to the preparation and execution of investments, and furthermore the distribution of benefits among municipalities for the execution of investments in the construction of nuclear power plants<sup>[21]</sup>.

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<sup>20</sup> See Nowacki, „Nuclear power of the Vistula River”, 184-185, and Mariusz Swora, Zdzisław Muras in *Prawo energetyczne. Komentarz*, ed. Mariusz Swora, Zdzisław Murasa (Warszawa: Wolters Kluwer, 2010), 78-84; Mirosław Pawełczyk, „Bezpieczeństwo energetyczne jako fundament bezpieczeństwa kraju. Zakres pojęciowy”, [in:] *Współczesne problemy bezpieczeństwa energetycznego. Sektor gazowy i energetyczny* ed. Mirosław Pawełczyk (Warszawa: Wydawnictwo Ius Publicum, 2018), 79-87, Marcin Nowacki, *Prawne aspekty bezpieczeństwa energetycznego Unii Europejskiej* (Warszawa: Wolters Kluwer, 2010).

<sup>21</sup> See Łukasz Dubiński, „Specustawa jądrowa i prawo atomowe (ocena wybranych planów legislacyjnych)”, 84-91, earlier Tomasz Bąkowski, Krzysztof Kaszubowski, „Regulacje tak zwanych specustaw inwestycyjnych wobec samodzielności i władztwa planistycznego gminy”, [in:] *Przestrzeń i nieruchomości jako przedmiot prawa administracyjnego – Publiczne prawo rzeczowe*, ed. Iwona Niżnik-Dobosz (Warszawa: Wolters Kluwer, 2012), 267 onwards.

The provisions of the Act do not apply to the extent regulated by the provisions of the Atomic Law, which means that, on the one hand, the legislator recognizes the equivalence of the two legal acts and their autonomy, and, on the other hand, that the legislator probably assumed that the subject matter regulated by these legal acts should be divergent. However, such assumptions do not seem to be conducive to the coherence (compatibility) of the different elements of the legal system, and it should be more appropriate to assume that the investment law constitutes a *lex specialis* in relation to the Atomic Law. Acceptance of such a suggestion would, however, require certain amendments, the underlying assumption of which should be that since the Atomic Law relates, as indicated above, to the issue (objective and subjective) of the peaceful use of nuclear energy, including activities carried out by means of various nuclear energy facilities, (in particular nuclear power plants), the investment law should naturally be treated as an act characterizing all the functionalities involved in the initiation, preparation and implementation of the construction of any nuclear energy facility.

In the first place, it should be considered whether the definitions and concepts constructed in the Atomic Law Act are transferable to the investment law. Then, it would be necessary to clarify the relationship between the category of security, which is repeatedly invoked in the Atomic Law, and the category of public interest, which is related to the content of the provisions of the investment law relating to the decision in principle.

It should be noted that the definitions of investments in the sphere of nuclear energy formulated in the investment law refer in some cases, admittedly indirectly, but nevertheless to the category of public interest, which interest may be regarded as the premise for the definition and realization of a public purpose. This is the case of the so-called „ancillary investments”, i.e. investments for the construction, reconstruction, overhaul, maintenance, use, change of use, operation or demolition of transmission, distribution, heating or cooling networks necessary for the derivation of heat or cold from the nuclear power plant, and other investments, i.e. those which are necessary for, in particular: construction, reconstruction, overhaul, maintenance, use, change of use, commissioning, operation or demolition of a nuclear power facility. Such investments have been classified as public purpose investments within the meaning of the Real Estate Management Act<sup>[22]</sup>, i.e. investments which are made for

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<sup>22</sup> See Act of 21 August 1997 on real estate management, consolidated text: Journal of Laws Laws of 2023, item 344, as amended.

a public purpose<sup>[23]</sup>. The same category also includes investments necessary: to conduct measurements, research or other work necessary for the preparation of a preliminary location report; to conduct measurements, research or other work necessary for the preparation of a preliminary safety report for a radioactive waste repository; and to conduct measurements, research or other work necessary for the preparation of a location report for a nuclear power facility, and to conduct research or other work aimed at preparing an environmental impact report for a nuclear power facility. As the legislator points out, within these types of investments, actions should be taken which allow formal actions to be taken, such as the location and environmental report. The realization of such investments is possible only after the investor obtains the decision in principle, which may be issued in connection with the public interest.

## 5 | Procedure for issuing decisions in principle

The decision in principle as a formal and legal structure<sup>[24]</sup> was introduced into the Act of 2011 on the preparation and implementation of investments, although it was significantly modified in 2023<sup>[25]</sup>. The changes introduced result, first of all, in giving a higher rank to the decision in principle by recognizing that it is the initial decision in the process of issuing administrative decisions that condition the preparation and commencement of construction of a nuclear power facility. Moreover, this decision has become a clear element of state control over the ownership structure of the entity being the investor and the procedure for issuing decisions by expanding the circle of bodies issuing opinions on the issuance of the

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<sup>23</sup> See art. 6 of the Act as above.

<sup>24</sup> This construction was characterized in the most extensive way in the publication by Łukasz Młynarkiewicz, *Decyzja zasadnicza w procesie przygotowania i realizacji inwestycji w zakresie obiektów energetyki jądrowej* (Sopot: Wydawnictwo Arche, 2020), 1-526, see also: Patrycja Wysocka, Patrycja Nowakowska, „Rola decyzji zasadniczej w procesie inwestycyjnym elektrowni jądrowej. Rozważania na tle aktualnego stanu prawnego i projektowanej nowelizacji” *Nowa Energia*, No. 5-6 (2022): 52-56, also Łukasz Dubiński, „Zasady wydawania decyzji zasadniczej (zagadnienia wybrane)” *Studia Prawnicze KUL*, No. 3 (2023): 41-57.

<sup>25</sup> See Act of 9 March 2023 *Journal of Laws*, item 595.

decision in principle. The legislator also recognized the possibility of transferring decisions obtained in the investment process to third parties, but after prior transfer of the decision in principle<sup>[26]</sup>. An application for the decision in principle should include: 1) the characteristics of the investment for the construction of a nuclear power facility, including the determination of: the planned total installed capacity (in the case of a nuclear power plant); the planned lifetime of the nuclear power plant; the municipalities in whose area the investment is proposed to be located; the reactor technologies to be used (also in the case of a nuclear power plant); 2) a description of the applicant's ownership structure; 3) a description of the importance of the investment in the construction of the nuclear power facility and the need for its implementation in the national electricity or heat demand; 4) a description of the radioactive waste disposal technology and the planned capacity of the radioactive waste disposal facility; 5) a description of the planned method of financing the investment in the construction of the nuclear power facility. Such a detailed and comprehensive application should constitute an adequate premise and at the same time the basis for issuing a correct decision in principle. Such an application should furthermore include a description of the technologies envisaged for use in the sphere of extraction of uranium or thorium ores from deposits – in the case of a plant for the extraction of uranium or thorium ores from deposits and for their initial processing (Article 3b)<sup>[27]</sup>.

The decision in principle is issued by the minister responsible for energy at the investor's request. With the application for the decision in principle, the investor attaches documents confirming the applicant's ownership structure and proof of payment of a fee, which is currently set at PLN 200,000. The fee for changing the decision of principle is half the amount. These fees constitute state budget revenue and are paid into the account of the designated minister's office.

The initiation of the procedure to issue the decision in principle does not imply an obligation on the part of the public administration body to notify a social organization (Article 31 para. 4 of the Code of Administrative Proceedings), although such an organization may request that the procedure

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<sup>26</sup> See on this topic: Łukasz Młynarkiewicz, „Decyzja zasadnicza w procesie inwestycyjnym w zakresie obiektów energetyki jądrowej. Ocena zmian wprowadzonych w latach 2023-2024” *Prawo i Więź*, No. 3 (2024): 443-473.

<sup>27</sup> See Dubiński, „Zasady wydawania decyzji zasadniczej (zagadnienia wybrane)”, 42-43.

be initiated and that it be allowed to participate in the procedure if this is justified by the statutory objectives of the organization and if the public interest so warrants. However, a social organization that does not participate in the proceedings with the rights of a party may, with the consent of the public administration body, submit to that body its opinion on the case, expressed in a resolution or declaration of its statutory body.

The Minister shall, within 90 days of receipt of the application, issue the decision in principle or refuse to issue the decision in principle, taking into account the public interest. In particular, the Minister should take into account the objectives of state policy, including energy policy, including the current and projected national demand for electricity or heat, but also the impact of the investment in the construction of a nuclear power facility on the internal security of the state<sup>[28]</sup>. The issuance or refusal of the decision in principle takes place after consultation with the Head of the Internal Security Agency with respect to the impact of the investment on the internal security of the state<sup>[29]</sup>. Thus, the Head of the Internal Security Agency, in formulating their opinion, should be guided by the public interest, which is the internal security of the state. Since the Act creates a kind of „bridge” between the investment and the internal security of the state, arguably the indicated body should assess the level of security in the context of undertaking and implementing the investment, the subject of which is the expenditure of funds and the implementation (construction) of a nuclear power facility.

As the relevant provision (Article 3a(1)) of the investment law indicates, the decision in principle safeguards the public interest in terms of state policy objectives, including energy policy<sup>[30]</sup>, and state security. This means that the decision in principle may be issued if its determination is in full compliance with the state’s economic policy in relation to the energy sphere and, moreover, the determination will take into account the state security.

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<sup>28</sup> See Łukasz Młynarkiewicz, „Decyzja zasadnicza w procesie inwestycyjnym w zakresie obiektów energetyki jądrowej. Ocena zmian wprowadzonych w latach 2023-2024” *Prawo i Więż*, No. 3 (2024): 443-447; Młynarkiewicz, *Decyzja zasadnicza w procesie przygotowania i realizacji inwestycji w zakresie obiektów energetyki jądrowej*, 217-293.

<sup>29</sup> See Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency, consolidated text: Journal of Laws of 2022, item 557 (Article 3 in connection with Article 5(1)).

<sup>30</sup> See e.g. Ministry of Climate and Environment, Poland’s Energy Policy until 2024 (Warsaw, 2021), annex to resolution No. 22/2021 of the Council of Ministers of 2 February 2021.

The issuance or refusal to issue the decision in principle takes the form of an administrative decision. The provision of Article 127 para. 3 of the Code of Administrative Procedure does not apply in this case, so that a party dissatisfied with the decision does not have the possibility to submit a request for reconsideration of the case.

Provision is made for a situation in which the decision in principle expires and the execution of the decisions issued on its basis, including the decision to establish and indicate the location of the investment, the permit to enter the property, the permit to construct a nuclear power facility, the permit for preparatory work and the permit to use the investment in respect of the construction of a nuclear power facility is suspended (Article 3f). This is the case when in an entity (or in a company which is a shareholder or partner in that entity) which has obtained the decision in principle another entity reaches a dominant position (according to the definition of such a position provided for in Article 4 para. 1 item 4 of the Commercial Companies Code<sup>[31]</sup>) without the consent of the minister responsible for energy.

The Minister shall grant consent, or refuse to grant such consent, taking into account analogous considerations as in the issuance of the decision in principle, i.e. the objectives of state policy, including energy policy, and the impact of the investment in the construction of a nuclear power facility on the internal security of the state. The Minister's consent (or lack thereof) shall be issued after consulting the Head of the Internal Security Agency with regard to the impact of the investment in respect of the construction of a nuclear power facility on the internal security of the state. The application for granting the consent shall include a description of the manner and mode of achieving a dominant position, in particular a description of the planned change in the ownership structure of the company which is the entity which obtained the decision in principle (or the company which is a partner or shareholder in that entity).

If a dominant position has been achieved without prior ministerial approval, the decision in principle shall lapse and the enforcement of other decisions issued on its basis shall be suspended, as indicated above. In such a case, the entity that obtained the decision shall apply for a new decision in principle.

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<sup>31</sup> Act of 15 September 2000, consolidated text: Journal of Laws of 2024, item 18.

## 6 | Structural elements of the decision in principle

In principle, only the investor may be the addressee of the decision. It may be issued only to an investor whose registered office is located in a member state of the European Union or a member state of the European Free Trade Agreement (EFTA), a party to the Agreement on the European Economic Area or a member state of the Organization for Economic Cooperation and Development (OECD). In terms of subject matter, the decision in principle may be issued for one or more nuclear energy facilities if these facilities are functionally related to each other.

The decision in principle determines the permitted parameters of the investment for the construction of a nuclear power facility. It seems that the authority, when determining them, should be guided not only by technical and technological considerations, but it is essential that it respects the requirements arising from the construction, environmental and any other regulations of an orderly and protective nature. Taking into account the provisions of the Atomic Law, it would also be advisable for the authority to take into account the requirements arising from the need to take care of the safety of the use of nuclear energy (nuclear safety), which should shape these parameters accordingly.

The decision in principle is the starting point and the necessary basis for the investor to apply for a location decision for the construction of the nuclear energy facility and other decisions necessary for the preparation, implementation and operation of the investment for the construction of the nuclear energy facility.

In its content, it is possible to specify the municipalities in the territory of which the construction of a nuclear power plant is allowed. The so-called maximum installed capacity and the types of reactor technology permitted from among the technologies specified in the application for a decision in principle, as well as the types of radioactive waste disposal technology permitted and the maximum capacity of the radioactive waste disposal facility are further determined<sup>[32]</sup>.

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<sup>32</sup> See art. 3e of the investment law.

## 7 | Summary

The public interest clause in relation to activities related to the shaping of the nuclear energy sector should be perceived in several contexts. First, the public interest should be perceived in the form in which it appears in the Atomic Law, i.e. as a security clause. According to the provisions of this Act, safety can and should be combined, in particular, with the use of nuclear energy, including the use of this energy for purposes related to business activities in the field of energy. The public interest in the form of security refers both to the need to provide society and the economy with energy supplies, and these supplies should be appropriately correlated with the needs and objectives of environmental protection, including climate protection.<sup>[33]</sup> Additionally, safety, as a generally defined value, in the Atomic Law should be combined with the safety of the operation of nuclear energy facilities, which undoubtedly involves the emission of radiation.

The public interest in the initiation, creation and operation of the energy economy, in particular the construction of nuclear power plants, is grounded first in the message and content of the constitutional principle of a social market economy. It is in the public interest that the modern state should, both independently and in cooperation with private investors, undertake all initiatives aimed at providing society and the economy with appropriate energy supplies, optimal for needs and ensuring energy security. It must be assumed that such directional activities related to the energy economy are undertaken in the social interest.

When it comes to the decision in principle, it is a carrier of the public interest clause, which has taken the normative form of a clause of compliance with the energy and state security policy. However, it would be impossible to assume that the decision in principle can be issued in isolation from the content of the provisions of the Atomic Law. This is determined by the fact that the Atomic Law concerns in particular an extremely important issue, which is the activity (including economic activity) related to the operation of nuclear energy facilities, which should both guarantee energy security for society and the economy, as well as ensure safe operating conditions of a nuclear power plant or similar facility. All the above-mentioned clauses, including primarily the security clause and its „mutations”, fall

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<sup>33</sup> See e.g. Sobczuk, *Energetyka jądrowa jako przejaw jako przejaw realizacji zasady zrównoważonego rozwoju*, 295-302.



under the generally understood and extremely capacious public interest clause, as indicated above.

Of course, it should be remembered that the addressee of the decision in principle, when undertaking activities -generally speaking- involving the construction and then operation of a nuclear energy facility, should also be guided by the needs related to the public interest, which under the investment law is expressed by the clause of compliance with state policy and security (including the state). Perhaps this is how the statement contained in Art. 3a section 1 of the above Act, according to which the decision in principle „secures the public interest”, i.e. its issuance resulting from the premise of the public interest should also provide a guarantee that the entity (addressee) will also take into account the public interest in its actions supported by the decision.

In the above approach, the basic decision on the construction of a nuclear energy facility should be considered as a form of securing the public interest in the broad sense.

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