



Integrated Pollution Prevention and Control

Legal Analysis

2007





The Hungarian Analysis of IPPC Laws



1. Short history of the IPPC regulation

During the EU environmental law harmonization campaign in 2001, Hungary introduced some changes on Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter: Environmental Code or GREP). The legal conditions of any significant usage of the environment were compounded with the IPPC permit and an IPPC specific rule was inserted into the GREP, namely that for the IPPC activities (determined in a Governmental Decree) the EIA procedural rules had to be applied, unless the specific rules of the Governmental Decree stipulates otherwise.

Two months later, also in 2001, the Governmental Decree was issued (No. 193/2001. (X. 19.) Korm.). According to this regulation the EIA and the IPPC procedures could not be merged. In every case, the developer had to apply first for the EIA permit and, if this procedure was successful, the environmental inspectorate would initiate the IPPC procedure immediately after closing the EIA.

This system got much criticism from regulated communities, authorities and representatives of environmental legal science. Their main complaints: a simpler and shorter procedure with better harmonization between the several elements of the environmental permitting system. Many experts also raised the necessity of differentiated regulations; the simplest cases not being handled identically with the more sophisticated.

Finally, Governmental Decree No. 314/2005. (XII. 25.) Korm. (hereafter: IPPC Decree) entered into force on 1st of January, 2006 and the respective changes were introduced into the Environmental Code concurrently.

2. The formal structure of the IPPC law

The Environmental Code contains definitions of IPPC procedures and the general statement that any significant use of the environment shall be subject (among others and only if the activity is in the Governmental decree) to an IPPC permit. We note that the definition of the IPPC in the GREP is quite questionable as it stands:

“Art. 70, Para. (1) In order to prevent emissions burdening the environment from certain activities listed in separate law and also to mitigate or eliminate the factors that influence

the environment in respect to these activities measures based on the best available technique shall be established in an IPPC permitting procedure.”

BAT in this definition is conceptualized as a general property of any measures applied for the purposes of environmental protection in connection with the planned activity, rather than a specific trait of applied technique. Also the term “factors” in the definition is ambiguous; one might think that any factors shall be mitigated or eliminated, not only those that are environmentally most significant.

The remainder of the Hungarian IPPC regulations are located in the IPPC Decree.

The term “IPPC” is mentioned in 47 laws in the Hungarian legal system,

- environmental laws, like Act on Nature Protection,
- Air and the Noise Decrees,
- EMAS Decree,
- ETS Decree,
- several Decrees on water protection, including the decree harmonizing the WFD,
- several decrees on waste management and also
- decrees on the structure and tasks (e.g. information collection) of the environmental protection institutions.

More importantly, there are other laws referring to the IPPC procedure or its result, like decrees on mining, electricity production and marketing and also a decree on the conditions of dissemination of a fund supporting certain agricultural activities. This legal arrangement qualifies as a good network of IPPC references that should result in a more effective implementation of the Hungarian IPPC laws and on a more general scale a better fulfillment of the requirements ensuing from the integration principle.

3. Substantial / Structural issues

The IPPC procedure is positioned in a relatively early phase of the drafting/permitting process of large, environmentally significant investments. In the Hungarian system it is managed simultaneously or consecutively (i.e. right after the EIA) with the EIA procedure.

In all cases where IPPC and EIA are both necessary, the environmental inspectorates bring only one summarizing decision at the end of the procedure(s).

There are further important connections with laws from the field of chemical safety (belonging to the public health authorities) and catastrophe prevention (belonging to the authorities of internal affairs). While the well-known overlapping of information processing activities of these three fields of law are dealt with in a later chapter, we will briefly analyze the interrelationships between the IPPC procedure and the

- so-called safety analysis and safety declaration of Act LXXIV of 1999 on the direction and organization of catastrophe protection activities,
- and the protection against grievous accidents in connection with dangerous materials.

The safety analysis is a document that contains general goals of the operator on the field of catastrophe prevention, a description of the direction and technical tools for the activities with purposes of protection of man and environment and also evidences that the operator has clearly identified and analyzed the dangers in connection with dangerous materials.

The safety declaration is a similar document for even more dangerous activities, where there are definitive plans for defense activities in addition to earlier mentioned content.

In any construction or usage-permitting procedures, the permit shall not be issued to the operators of dangerous facilities defined by the Act, without the consent of the National Catastrophe Prevention Chief Directorate, based on a proper safety-analysis or declaration.

Interestingly, the IPPC decree also refers to the necessity of considering safety analyses and declarations wherever they are necessary. This way the IPPC legislator tried to avoid duplication between chemical safety/catastrophe prevention preparedness examinations and the environmental examinations in the IPPC procedure.

4. General rules and principles of IPPC regulations

While the first recital of the Directive directly refers to certain general environmental protection principles of Article 130r of the Treaty, such as

- prevention,
- mitigation of pollution,
- prevention at the source of pollution,
- rational management of the natural resources and the
- pollution pays principle,

Hungarian law fails to reflect these principles correctly. They are not referred to in the Hungarian EIA-IPPC Decree at all, no are they are transposed substantially into the General Environmental Code.

5. Relevant definitions

In Point 2 above, we refer to the fact that, although it was not necessary, the Hungarian legislature created a definition of the IPPC procedure itself. We have some reservations in connection with the correctness of the BAT element within the definition.

Some definitions of the Directive were copy-pasted into Hungarian law, such as

- change in operation and substantial change,
- best available technique,
- the public and the public concerned.

Others were already defined in Article 4 of the Environmental Code and the Hungarian legislature thought them, in effect, to be in harmony with their European equivalents. This is not always true. In some cases the Hungarian definitions seem to be more substantial and logically a better fit for the environmental legal definitions of GREP. Such definitions and the definitions closely belonging to them are:

- *“Environmental burdening: issuing any material or energy into the environment directly or indirectly;”*
- *“Environmental pollution: burdening of any element of the environment in a way that exceeds the emission limit;”*

- *“Emission limit: burdening the environment or one of its elements in a way defined by law or a decision of an authority that, if exceeded, damaging the environment might take place;”*
- *“Pollution limit: polluting the environment or one of its elements in a way defined by law or a decision of an authority that, if exceeded, damaging the environment or human health might take place according to the up to date scientific knowledge;”*

Substance, installation, competent authority, permit and operator are not defined in the Hungarian IPPC laws.

There is a background decree on the European law harmonization that gives general entitlement to the law-drafters to overlook those definitions which are self understood in the Hungarian language and legal practice. This is generally not problematic, and the Hungarian legislature could avoid the dangers of failure to define such otherwise obvious terms as installation, with its more substantial elements in the Directive.

For example, off-site activities with technical connection to on-site activities might have led to serious flaws in the practical implementation of the Hungarian IPPC laws.

6. Best Available Technology

We have already flagged reservations concerning the Hungarian definition of the BAT in the previous point.

A typical element of the Hungarian IPPC laws, is that determination of BAT is a very circumstantial procedure that requires taking into consideration

- two Annexes of the EIA-IPPC Decree (Annex 9 and 11),
- separate laws (not yet issued),
- the specific requirements established by the authority in permitting individual cases and
- consultation (as the law says: a consultative procedure) between the environmental inspectorate and the developer.

While, if necessary, the inspectorate can ask more than a dozen so-called consultative authorities to take part in the discussions concerning BAT, there is no mention of any other participants in the EIA-IPPC procedures, such as the concerned municipalities or the members and organizations of the concerned public.

This arrangement has a negative influence on realization of one of the most important general administrative procedural principles; the principle of fairness, an evenhanded handling of all the clients taking part in the case.

In order to best accommodate Hungarian needs and possibilities, the Hungarian Ministry of Environment and Water Management (MERP) developed a set of national BAT Reference Documents (BREFs), covering the majority of fields the European BREFs encompass.

7. The content of the request and permit

Important specific elements of the request and the permit, according to Hungarian law, without repeating those elements that are copy-pasted from the text of the Directive:

- *the standard identification number of the requestor, the activity and the site and also the emission sources within the site, using the national standard coordinates;*
- *determination of the territorial scope of effects;*
- *data determined by other laws (not yet issued) on environmental insurance and bonds;*
- *conditions, measurements and emission-limit values concerning soil, air and water, and also noise and waste--such elements of the decisions are based on existing laws regulating these media of the environment;*
- *pilot operation, if necessary;*
- *deadlines for performing responsibilities and reaching emission values;*
- *expiration of the permit, if necessary, but not shorter than 5 years (in our opinion it is a very weak provision).*

We note that many elements overlap with the content of the EIA request and decision. Therefore they appear to be superfluous, as the EIA and the IPPC procedures are practically merged in the new Hungarian environmental law.

8. Revealing the facts

In the Hungarian EIA-IPPC cases, fact finding is mostly based on private expert studies prepared by the developer or by experts commissioned by the developer. Independent experts are very rarely involved in the procedures.

Even if general administrative law makes independent expertise possible, the specific IPPC laws are silent concerning this possibility and thus it seems “not advisable”. Meanwhile, expert officials working at the environmental inspectorates and at the consultative authorities can only supervise already completed examinations with their very limited time and technical equipment.

A special fact-finding measure is the pilot operation, a kind of *post factum* method for making certain facts clear for the authorities about the operation of the project. Certain parameters of pollution emission cannot be effectively foreseen. *In such cases the environmental authorities have the option to issue a permit upon the condition that during the pilot operation such parameters will be closely examined and minor changes in the operation might be ordered, depending on the results of the pilot operation.*

Another specific trait of the Hungarian EIA-IPPC procedure is the extensive participation of so-called consultative authorities. Seventeen such authorities, including, but not limited to

- forestry,
- soil protection and registration,
- mineral resources,
- spa and other authorities

may be invited into cases by the inspectorate if their respective field of authority seems to be concerned. Actually one, the public health authority, *must* be included in all cases.

9. Existing activities

There is a specific legal institution in Hungarian law, 'environmental supervision' that is a uniform procedure for every existing operation with significant environmental effects, even those that are not necessarily on the EIA or the IPPC list of activities. The only difference between the environmental supervision for *existing* IPPC list activities and the other subjects of supervision is that for the first-mentioned group of activities the IPPC rules shall be taken into consideration *mutatis mutandis*.

Environmental supervision, according to the Environmental Code, can be mandatory or optional, depending on the discretionary decision of the inspectorate and also it can be full-fledged or fragmented.

In the case of IPPC list activities launched before October 31, 2001, supervision is always mandatory and full.

10. Authorities participating in the procedure

The lead authorities in the EIA-IPPC cases are the environmental inspectorates organized not by the public administration borders of the counties, but according to the watersheds of the larger and smaller rivers of Hungary. This way, they better cover the geographical/biological traits of the examined cases.

The other authorities participating in the procedures are the consultative authorities we described in Point 8 above.

Municipalities have a specific double role in EIA-IPPC procedures in Hungary. From one side, the Municipality Councils as political representatives of the local population are parties to the EIA-IPPC cases and stand up for their rights quite actively in almost 20 % of the cases. On the other side, municipal clerks are one of the consultative authorities in local environmental and nature protection matters and also in matters of protection of the built environment on a local scale.

Naturally, in practice there is a certain interplay between the two kinds of municipal participation. For example, the Municipal Council can accept a local ordinance concerning nature protection within certain areas. Meanwhile, the clerk can issue a negative consultative authority opinion in a relevant EIA-IPPC case that is obligatory for the lead authority and results in an overall rejection of the permit application of the developer.

11. Integration of permits

The integrating approach of the IPPC laws is not always of consequence under Hungarian law. There are numerous (in growing number) permits that shall be issued *apart from* the EIA-IPPC permit. However, legal literature¹ established a list of environmental permits that most certainly shall be covered by the IPPC procedures. This list encompasses:

- point source air pollution permitting
- water management permits (several dozens of permits)
- nature protection permits (also very numerous kinds of permits)
- waste management permits
- underground and surface water pollution emission permits

12. Revision (modification, repealing) of the IPPC permit

As we already referred, permits can be issued for indefinite terms and the legislature, quite interestingly, determined a minimum term as well for the IPPC permit. In a slight contradiction to that, the same law prescribes a revision of the implementation of conditions and instructions given in the IPPC permit *every five years*, according to the rules of environmental supervision. In addition to that requirement, an extraordinary supervision shall take place whenever the inspectorate finds

- a significant change in the quality or quantity of the emissions from the installation or any other significant alteration in use of the environment by the operator;
- that the BAT has significantly changed;
- that new safety considerations require the application of different techniques; or
- the installation causes significant burdening of the environment otherwise.

A compromise solution (for cases where changes are not so significant as to require full-fledged environmental supervision) is change of the IPPC permit without the time and resource-consuming supervision procedure. On the other hand, the inspectorate is, in principle, entitled to revoke permits without such supervision, when it considers the changes so dramatic that the permit cannot be maintained in any event and that the supervision procedure would amount to a waste of time and resources.

In order to decide the above questions, inspectorates are obliged by the IPPC laws to monitor the implementation of permits at least once a year, including a site surveillance. During that process, officials of the inspectorate check if the operator maintains the technology requirements, handles the environmental protection devices correctly, trains the workers etc. in order to implement the conditions and instructions of the IPPC permit.

We note that, while it is possible according to the new general administrative procedural law of 2004 that the authority may enter the facility without a prior notice to the operator, in practice it rarely happens. The inspectorates declare that they inform the operator about the time of site visit to make it able to prepare the facilities for controlling. But in actuality, local communities believe the authority tries to avoid conflicts with the operators in this way.

¹ László Teszár in the book "Preliminary Examination, Environmental Impact Assessment, IPPC" (Magyar, Fülöp, Tombácz and Teszár), Budapest, 2006, Complex- Wolters Kluwer, pp. 531-542.

13. Data servicing of the operating facilities holding IPPC permits

The EPER is a responsibility of the Member States, rather than the operators, therefore there is no direct PRTR-like responsibility for them as yet. However, quite naturally, the Ministry of Environment and Water Management wishes to gather the necessary information from the largest operators and it therefore prescribes the proper information-servicing from them in their respective IPPC permits.

In addition to that, the several media-specific laws contain separate information-servicing requirements, all of which (as a rule) are part of the IPPC permit conditions. Larger operators usually say that this way they are obliged to report the same data 4-5 times with slight modifications.

14. Public participation

The Environmental Code establishes quite strong general legal requirements in connection with public participation in environmental decision-making. As a principle it declares that everyone is entitled (and authorities are obliged to help in that respect) not only to have access to environmental data, but also to get proper information in order to understand the significance of them and the most important interrelationships between environmental pollution and public health.

In addition to that, the well known and frequently used Article 98(1) of the GREP ensures standing for environmental NGOs in environmental administrative cases, on their scope of territory and in their scope of activity. While this public participation regime ensures wide and substantial participation for practically all kinds of non-profit, non-partisan social organizations, the twelve-year history of the legal practice of Article 98(1) shows that almost all elements of the rule were put under meticulous scrutiny by the authorities in order to find ways to limit or totally exclude public participation.

That's why this rule was further interpreted by the Supreme Court in its Legal Unity Decision No. 1/2004. The essence of the court decision is that every case counts to be environmental once the environmental authorities take part in them either as lead authorities or as consultative authorities. We note, however, that certain ministries, especially the Ministry of Economics and Transport, try to circumvent this rule by giving another name to the inclusion of the environmental inspectorate, such as "expert authority" instead of the term consultative authority.

Within the specific public participation rules of the IPPC laws, public participation shall take place in the permitting procedures and also in the supervision procedures. Notification and access to the files of the procedures take place in full accordance with Article 6 of the Aarhus Convention. We note that the Hungarian practice excessively makes use of the mediator role of the local municipalities, especially the clerk. Concerning information techniques, homepages and public space billboards shall always be used.

The most outstanding feature of the public participation rules in the Hungarian IPPC law is due consideration for public feed-back. All significant comments shall be evaluated in the reasoning part of the final written decision of the inspectorate and the evaluation itself shall consist of a detailed factual, professional and legal analysis of comments.

15. Secret protection

There is a specific section on secret protection in the Hungarian EIA-IPPC Decree. The solution the Hungarian legislature selected to balance the interests of open public interest data and the interest of confidentiality in the handling of certain types of sensitive data, is the separation of the secret part of the file with the normal level of public access to the rest of the documents. The weak side of the Hungarian regulation is that the task of separation is clearly with the requester rather than the lead authority in the cases. The requester puts sensitive information into a separate envelope that is not attached to the public part of the documents and there is no such procedural step prescribed in the Decree to guide the question of secrecy in merit.

If someone types the word “secret” into the electronic search function of the Hungarian CD law collection they get 1478 response. We note that 10 years ago this number hardly exceeded 400. The structure and list of types of secrets in Hungarian law is similar to that of the Aarhus Convention:

- secrets out of state interests,
- administrative interests and
- third person interests.

The only minor difference is that the “manifestly unreasonable” and “non existing” issues are not directly regulated in Hungary from the second group, while the administrative practice is quite similar to the Aarhus text in both cases.

16. Sanctions

Any activity subject to IPPC permit but run without or infringing the IPPC laws is threatened by several kinds of sanctions according to the EIA-IPPC Decree:

- limiting,
- suspending or prohibiting the activity,
- obligation to prepare an action plan,
- fine ranging from 50000 HUF to 1 00000 HUF (200-400 Euro)/day and
- revocation of the already issued permit

Environmental supervision behaves under certain circumstances as a sanction; e.g., the operator failed to report significant changes in the operation.

The sanctions differ in weight according to the kind and extent of the infringement of the IPPC laws, including:

- activity without permit
- activity infringing the conditions in the permit
- unreported changes in the activity
- environmental pollution
- endangerment of the environment
- infringement of decisions on sanctions.

In each case the specific content/amount of the sanction may depend upon culpability by the perpetrator and on the level of danger/harm to the environment.



The Czech Analysis of the IPPC Laws

1. Short history of the IPPC regulation

The Act No. 76/2002 Coll., on integrated pollution prevention and control, on the integrated pollution register and on amendments to some Acts, entered into force on January 1 2003. The IPPC Act was amended five times.

- First amendment was made by the Act No. 521/2002 Coll because of new Act No. 86/2002 Coll. on Clean Air Protection.
- Second amendment - Act. No. 437/2004 Coll. narrowed the categories of activities of chemical industry which are subject of IPPC.
- Third, the IPPC Act changed slightly because of the new Act No. 695/2004 Coll. on the conditions of greenhouse gas emission allowance trading.
- Fourth, Act No. 444/2005 Coll. changed the IPPC Act slightly in connection with the change of the financial authorities.
- The fifth and last last amendment by the Act No. 222/2006 Coll. was the largest. Reasons for this amendment are: transposition of new Directive 2003/35/EC, change of Directives 85/337/EEC and 96/61/EC and negative experiences with the IPPC Act (uncertain or missing definitions, administrative demands of the proceeding etc.).

2. The formal structure of the IPPC law

IPPC law is represented in Czech law by one Act.

Permit is issued by the authority in the administrative proceeding, which is laid down generally in the Administrative Code (Act No. 500/2004 Coll.). The Administrative Code is effective where the IPPC Act does not have its own regulation of the proceeding (the Administrative Code is subsidiary to the IPPC Act).

Specific measures concerning application form, the system of exchange of information about BAT and integrated pollution register are included in Regulations and Decrees of the Government, which implement certain provisions of the IPPC Act.

3. Substantial / Structural issues

IPPC is a separate proceeding from EIA procedure. Both procedures can be done at the same time, but usually the EIA precedes the IPPC (information gained during the EIA procedure is one of the bases for IPPC procedure).

Although the IPPC can be done at the beginning of the permitting chain, it is purposeful to initiate the IPPC after the precise location of the installation in the planning procedure is decided.

The IPPC permit could replace some of the decisions, statements and approvals of the competent authorities, which must be obtained before planning permission. Czech law fixes the IPPC procedure in building permission, which can only be issued after the IPPC permit.

4. General rules and principles of IPPC regulations

Basic responsibilities of the operators are listed in Art. 16 IPPC Act as follows:

- comply with the conditions stated in permit,
- inform the competent authorities of any changes planned in the operation of the installation,
- cooperate with the competent administrative authorities in controlling compliance with the conditions of the permit,
- notify the competent authority without delay of all unusual situations, accidents at the installation and accidental releases of pollutants from the installation into the environment,
- record information on compliance with the binding conditions for operation of the integrated permit.

5. Relevant definitions

The IPPC Act contains definitions of:

- installation,
- pollution,
- emission,
- emission limit values,
- transfer,
- best available techniques,
- environmental quality standard,
- integrated permit,
- integrated pollution register,
- change in operation of an installation,
- operator of an installation and
- user of a registered substance.

The definitions of installation and emission limit values are in compliance with the Directive 96/61/EC since 1.5.2006. There are still non-conformities in the definitions of emission and permit.

6. Best Available Technology

Best Available Techniques (BAT) is defined in the Art. 2 (f) IPPC Act which is since 1.5.2006 literally transposition of the same definition in Directive 96/61/EC including the special consideration determining the best available techniques.

The obligation of the Czech republic to ensure that the competent authority follows or is informed of developments in BAT is regulated by the IPPC Act by the system of exchange of information on the BAT. That includes monitoring of changes in BAT contained in EC documents and their translation and explanation, provision and publishing of information on trends in BAT.

The system of exchange of information on the BAT is ensured by the

- Ministry of Industry and Trade,
- Ministry of the Environment,
- Ministry of Agriculture,
- Czech Environmental Inspectorate and
- Regional authorities.

The application has to contain the comparison of the installations with the BAT.

If it is required by the competent authority, the Authorized person has to prepare an expert statement about the application of the BAT or expert statement concerning the whole application for permit. In setting the binding conditions of operation, in particular the emission limits, the competent authority shall base its considerations on the use of the BAT on the basis of the aspects set forth in Annex No. 3 to IPPC Act, taking into account the technical characteristics of the installation, its location and local environmental conditions, without prescribing the use of one specific technique or specific technology.

7. The content of the request and permit

The content of the application for permit is laid down in the IPPC Act (Art.4) and it is in conformity with the Directive 96/61/EC (Art. 6).

In addition to the element required by the Directive, the IPPC Act requires

- description of the technology and other techniques to prevent/reduce the production of emissions,
- proposal for the binding conditions of operation of the installation and
- overview of the possible main variants of the technology proved by the operator of the installation.

The permit has the form of an administrative decision, containing general elements according to the Administrative Code,

- identification of the operator,
- description of the installation,
- activities connected therewith and its location, conditions for operation of the installation and
- activities directly connected therewith.

The binding conditions are:

- the emission limits
- measures to eliminate the risk of potential pollution of the environment and danger to human health,
- the conditions for ensuring protection of human health and the environment in waste management, in particular protection of the air, soil, forests, ground waters and surface waters, nature and the landscape,
- other special conditions for protection of human health and the environment that the Authority considers essential in relation to local environmental conditions and the technical characteristics of the installation,
- measures for effective use of raw materials and energy,
- measures to prevent accidents and limit any consequences thereof,
- procedures or measures for operation related to situations differing from the conditions of normal operation (e.g. starting-up of the installation, break-downs in the installation, short-term suspension and definitive termination of the operations of the installation), in which a risk of danger to the environment or human health could arise,
- the manner of monitoring emissions and transfers and/or technical measures, as appropriate, including specification of the measuring method, including its frequency , keeping records and monitoring,
- measures to minimize long-distance relocation of pollution or trans-boundary pollution and to ensure a high level of protection of the environment as a whole,
- procedures for evaluation of compliance with the conditions of the integrated permit, including the obligation to submit to the Authority information to verify compliance with the integrated permit.

The competent authority is obliged to include in the integrated permit the environmental protection requirements set forth in the standpoint on environmental impact assessment, if set forth therein, or state the reasons in the integrated permit why they did not do so or only partly did so.

The competent authority is obliged to include in the integrated permit the public health requirements set forth in the standpoint of the competent authority.

8. Revealing the facts

Pilot operations are only possible after issuance of the building permission, when the IPPC procedure is complete. Carrying out a pilot operation can be stated in the building permission with the purpose to attest the compliance with the conditions of the integrated permit.

Statements of independent experts can be used by the participants of the IPPC procedure to document their reservations to the installation.

9. Existing activities

The transitional periods for existing installations are construed differently from the Directive 96/61/EC. The IPPC Act distinguishes two types of existing installations with different time-limits for fulfillment of relevant obligations following IPPC permit.

- The provision Art. 42 lays down that operator of the installation for which he submitted an application for a building permission (1) by October 30 1999 and which he (2) brought into operation by October 30 2000, has a duty to obtain an integrated permit by October 30 2007 if he intends to operate his installation after that date.
- The provision Art. 43 lays down that operator of the installation which he brought into operation between October 30 2000 and January 1 2003 (or had a building permission for such installation by January 1 2003) has a duty to apply for IPPC permit prior to April 1 2003.

The time-requirement of the Directive for an obligation to obtain an IPPC permit is much stricter; by 30 October 2004.

Please note that the Czech Republic was granted a transitional period for the Directive 2001/80 EC, on the limitation of emissions of certain pollutants into the air from large combustion plants till 31.10.2007 for fulfillment of limits for SO₂ for two installations-- Teplárna Přerov and Nová Huť a.s.

Therefore, we conclude conformity for the existing installations ad 2) that implemented the requirement within the time-limit of the Directive.

However, we conclude non-conformity for existing installations ad 1) due to the late transposition requirement.

10. Authorities participating in the procedure

The public administration is executed by:

- a) the Ministry of the Environment,
- b) the Ministry of Industry and Trade,
- c) the Ministry of Agriculture,
- d) the Ministry of Health,
- e) the Regional Authorities,
- f) the Czech Environmental Inspectorate,
- g) the Regional Hygiene Officer.

Participation of above-listed authorities is mandatory in different parts of the IPPC procedure.

The main part of the IPPC procedure has the Ministry of the Environment and the Regional Authorities deciding the application for permit, depending whether the operation of an installation significantly and detrimentally affect the environment of another state. All other authorities (whose decisions, statements and approvals are replaced by the IPPC permit) are involved in the IPPC procedure as well. They give their opinion regarding proposals for the binding conditions for operation of the installation.

11. Integration of permits

The IPPC permit replaces separate decisions, statements and approvals according to the

- Water Act,
- the Act on Clean Air Protection,
- the Act on Waste,
- the Act on Protection of Public Health (concerning the noise and vibrations),
- the Act on Water Conduit and sewer system.

Since 1.5.2006 there is no integration in connection to

- the Act on the Conservation of Agricultural Land Resources,
- the Forest Act and
- the Act on the Protection of Nature and the Landscape.

12. Revision (modification, repealing) of the IPPC permit

The competent authority carries out every max. 8 years a review, if there is reason to change the obligatory conditions of IPPC permit. Besides reasons for reconsideration and updating of permit conditions laid down in Art. 13 Directive 96/61/EC, which are correctly transposed to the Czech legislation, the IPPC Act includes as reasons, changes of emission limits or environmental quality standards. The IPPC permit shall be repealed in case of:

- dissolution of the operator without a legal successor,
- cessation of operation of the installation following compliance with the conditions of the integrated permit connected with cessation of the operation of the installation, or
- failure to utilize the integrated permit without a serious reason for a period of longer than 8 years.

13. Data servicing of the operating facilities holding IPPC permits

The Ministry of the Environment maintains an integrated pollution register as a publicly accessible information system of the public administration. The Ministry of the Environment shall disclose data reported to the integrated pollution register by September 30 of the current year on the public administration web site.

The Ministry of the Environment shall annually publish in written or electronic form information received and processed on the basis of the data reported to the integrated pollution register.

14. Public participation

Everybody can submit to the application his/her comments which shall be dealt with by the competent authority in the decision. With this, the participation of the broad public interest ends.

The public in a more narrow sense is, according to the IPPC Act, represented by civic associations, public benefit societies, federations of employers or chambers of commerce. This may include those whose sphere of business consists in enforcing and protecting professional or public interests pursuant to special regulations and also municipalities or regions in the territory of which this installation may affect the environment. That of course, depends upon these

participants applying in writing to the authority competent to grant the integrated permit within 8 days of the date of disclosing information from the application to the public.

These groups can also submit their statement to the application and require an oral discussion of the application. The public in any broad sense cannot take part on this discussion. Only the public in the narrow sense can appeal against the decision and file motions to the court against an appellate decision.

All participants have the right to inspect files, which are by the authority.

The public in the broad sense have such right only if they prove their legal interest in the matter or any other serious reason and if none of the rights of any of the participants or other persons concerned or the public interest are not prejudiced thereby. The competent authority is obliged to disclose on the public administration web site within certain time limits the application for permit, expert statement of an authorized person and final decision of the competent authority.

15. Secret protection

According to the IPPC Act the competent authority shall be obliged to ensure protection of business secrets, personal information and other information protected pursuant to the special regulations, if this information is designated as protected in the application.

This provision does not apply to information about the operator, description of the installation and activities, its location, category, a generally understandable summary of the data on the technology etc. and proposal for the binding conditions of operation of the installation.

16. Sanctions

The IPPC Act regulates the consequences of the administrative tort imposing fines. For the following torts there is fine max. 1 000 000 CZK (1 EUR = 26 CZK at November 2007);

- not to inform the competent authorities of any changes planned in the operation of the installation,
- not to notify the competent authority without delay of all unusual situations, accidents at the installation and accidental releases of pollutants from the installation into the environment,
- to state false data in the application which could have an effect on the issue of IPPC permit,
- not to file the application for change of the IPPC permit in the time limit set by the competent authority

For torts to operate the installation without valid permit, to fail to introduce measures for a remedy within an appropriate deadline there is fine max. 7 000 000 CZK.

It depends on the decision of the competent authority to set the amount of the fine. This depends on whether the sanction is effective.



The Austrian Analysis of IPPC Laws

The following analysis gives an overview over the situation concerning IPPC in Austria. It is primarily based on the Austrian Implementation Reports to the Commission of 2003 and 2006.



1. Short History of the IPPC regulation

Austria initially attempted to transpose the IPPC Directive, along with other legislative provisions, as part of a far-reaching reform designed to standardize the law on installations (Industrial Installations Environment Act).

After it became clear in June 1999 that the plans for an Industrial Installations Environment Act could not be put into effect, Austria went on to implement the IPPC Directive by amending the sectoral laws on installations on a federal level.

In terms of provincial law too, there was initially a tendency to transpose the IPPC Directive through the relevant sectoral laws, primarily concerning intensive livestock farming and energy production.

Eventually, most provinces decided to create their own IPPC installation laws to apply within their fields of jurisdiction.

The only substantial changes in Austrian IPPC legislation occurred through the transposition of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

2. Formal structure of the IPPC law

In terms of Federal Law the transposition of the IPPC Directive was carried out through the following sectoral laws:

- The 2002 Waste Management Act (AWG 2002 - BGBl [Federal Law Gazette] I No. 102/2002),

- The 1994 Trade, Commerce and Industry Regulation Act (GewO 1994), BGBl No. 194,
- The Mineral Raw Materials Act (MinroG) BGBl I No. 38/1999 and
- The Pollution Prevention from Steam Boilers Act (EG-K), BGBl I No 150/2004.

As mentioned above the provinces in most cases decided to transpose the IPPC Directive by the use of own IPPC installation laws which apply in their fields of jurisdiction, i.e. the IPPC installation laws in

- Vorarlberg (Vorarlberg IPPC Installations Act, LGBl [Provincial Law Gazette] No. 20/2001),
 - Carinthia (Carinthian IPPC Installations Act, LGBl No. 52/2002),
 - Vienna (Vienna IPPC Installations Act, LGBl No. 31/2003 of 22 July 2003),
 - Styria (Styrian IPPC installations and Seveso II Installations Act, law passed on 1 July 2003) and the implementation in the
 - Upper Austrian Environment Protection Act (Amending Act LGBl No. 83/2002)
- were passed.

Otherwise, implementation has been via sectoral laws, mainly in the electricity industry sector (Burgenland, Lower Austria and Tyrol).

The fact that a variety of legal sources on different levels of governance are touched by the IPPC directive allows for an exemplary treatment of the transposition into Austrian federal law. The GewO was chosen as a main reference for this analysis because it is the most comprehensive legal act with the most practical impact.

The transposition of the IPPC Directive in the GewO happened in a fragmented and confusing manner. The substantial provisions have been integrated into the GewO in a different place than the procedural provisions. They have also not been labeled as transposing the Directive; it is therefore hard for even experts to find the appropriate provisions. This is due to the existing structure of the GewO which could and should have been subject to fundamental reform in the transposition process.

3. Substantial / Structural issues

In the MinroG as well as in the GewO, authorities have to ensure that industrial installations underlying the IPPC procedure fulfill certain criteria. Industrial installations falling under IPPC law are generally dealt with in the regular procedure foreseen in the GewO. The system of the GewO also allows for a simplified procedure (§359b GewO) with less stringent public participation and notification provisions.

The regular procedure is modified for IPPC installations; for example additional criteria for their authorization are introduced in § 77a GewO. One of the main differences to the regular procedure can be found in § 77a par. 5 GewO (new authorization) and in § 356a GewO (authorization of an alteration). These two provisions try to provide for transparency within the IPPC procedure by publishing the relevant application (for details see below Public Participation).

According to §356b GewO authorization proceedings for installations covered by this act are integrated procedures. Separate authorization procedures are not undertaken unless explicitly

determined otherwise. Experts from the affected areas are to be consulted. The relevant provisions of other acts are nonetheless applicable (§356b par. 1 GewO) and one single permit is issued covering nearly all requirements according to federal environmental legislation.

Provincial legislation is not included, but the authority competent for the authorization of the IPPC permit must coordinate the proceedings for provincial requirements with other (provincial and municipal) authorities (§356b par. 2 GewO). This concerns mostly construction law (building permit), which is dealt with at municipal levels and (if required) permitted according to nature protection legislation.

Procedural requirements in the event an installation requires both an EIA and an IPPC permit:

All other authorization proceedings on federal as well as on provincial level are integrated into the EIA procedure if an EIA is necessary. The authority competent for the EIA has to apply the relevant provisions and has to verify, if all requirements of all administrative prescriptions are fulfilled (§ 3 par. 3 and § 17 par. 1 UVP-G; Environmental Information Act).

Therefore the IPPC procedure, a procedure intended for the concentration of various different procedures, is itself integrated into the EIA.

4. General rules and principles of IPPC regulations

§77 GewO contains the basic criteria for the authorization of an installation covered by this act. An installation can (in general) be authorized if it can be expected that in any event or if certain appropriate conditions to be stipulated are complied with, the risks foreseeable according to the circumstances of the individual case, can be avoided and nuisance, disturbance or adverse effects are kept within reasonable levels.

The responsibilities of the operators as contained in Article 3 of the IPPC Directive are expressed as conditions or criteria for the authorization of the facility (as for other installations). This is true both for federal and provincial law.

§ 77a GewO is the basic provision regarding IPPC installations covered by this act. According to this provision it must be ensured that “IPPC installations” are constructed, operated and shut down in such a way that

- appropriate precautionary measures are taken against environmental pollution, particularly through the use of technological processes, equipment and working practices which correspond to the state of the art (BAT) and the efficient use of energy (§ 77a par. 1 no. 1 GewO);
- necessary measures are taken to prevent accidents and to limit their consequences (§ 77a par. 1 no. 3 GewO);
- necessary measures are taken on shut-down of the installation to avoid any pollution risk and to return the site of the installation to a satisfactory state (§ 77a par. 1 no. 4 GewO).

§ 353a GewO determines additional contents for the application for a permit regarding an IPPC installation (see below Q7).

5. Relevant definitions

BAT

Austrian legislation does not use the notion of BAT. It contains a similar concept which can best be translated as “state of the art” (Stand der Technik). In the light of the directive this has to be interpreted as ensuring the same technical standard as BAT. General instructions on how to determine the BAT can be found in § 71a par. 1 and Annex 6 GewO and in §109 par. 3 MinroG. Within the area covered by the AWG 2002 a variety of orders (eg. Concerning incineration of waste) and guidelines (eg. Concerning the delivery of waste and its treatment) have been established (see below).

§ 71a par. 1 GewO 1994 is worded as follows: *“The best available techniques as defined in this Federal Act are the state of development based on the relevant scientific knowledge of progressive technological processes, equipment, construction or operating methods, whose fitness for function has been tried and proven. In the determination of the best available techniques in particular comparable processes, equipment, construction or operating methods must be consulted, which are most effective in achieving a generally high level of protection for the environment as a whole. Furthermore, consideration shall be given to the criteria under Appendix 6 of the Trade and Industry Act 1994, in consideration of the costs arising from a specific measure and its benefits, and the precautionary and prevention principles in general, as well as in a specific case.”*

According to this provision, when determining the BAT, particularly the comparable techniques, facilities, construction and operation methods are to be analyzed, which provide for the most effective environmental protection. Cost-benefit analysis arguments as well as the precautionary principle are also to be taken into account. §109 par. 3 MinroG contains a similar wording.

The provinces have not issued any guidelines.

For determining the best available techniques, applicable legislation or technical standards are frequently consulted. For the most part, these are standards published by the Austrian Standards Institute. These so-called Ö-NORMEN (Austrian standards) often find their way into the wording of requirements. Corresponding guidelines can also be found in the literature.

If documents to determine the BAT exist, they are supposed to be referred to on a provincial level. If they are not available in the literature, criteria laid down in relevant working documents from specialist bodies such as the Austrian Water and Waste Management Association (ÖWAV) and limit values in comparable European standards are consulted for the evaluation in the individual case. In any case the basis for decision is the expert’s report, which must take account of such documents in conjunction with the available specialist knowledge.

BREF:

Annex 4 no. 11 of the AWG 2002 determines that when determining the BAT, the information published by the commission pursuant to article 16 par. 2 of the IPPC directive as well as the information published by international organizations has to be taken into account.

According to official information, the federal ministry for trade and employment publishes BREFs on its homepage www.bmwa.gv.at. Around 30 BREFs can be downloaded there. There have been complaints about difficulties with the application of BREFs as they are mainly published in English.

Activity and installation

Annex 3 of the GewO lists all kinds of installations and activities covered by the act as well as the corresponding limit values.

Q6 Best available technology (BAT)

As mentioned above the notion “BAT” is not used in Austrian legislation. The “state of the art” concept is defined in §71 par. 1 GewO as mentioned above. For determining the BAT, orders have often been issued for the areas covered by the different federal acts.

AWG 2002:

- Landfill Order, BGBl No. 164/1996
- Order on the incineration of hazardous waste, BGBl II No. 22/1999
- Order on the incineration of waste, BGBl II No. 389/2002 (Article 1)
- Waste oil order 2002 (relating to the incineration of waste oil), BGBl II No. 389/2002 (Article 5)
- Section of the Federal Waste Management Plan 2001, Guidelines on delivery of waste and treatment principles
- Guideline on the mechanical-biological treatment of waste, Publication series of the Federal Ministry for Agriculture and Forestry, Environment and Water Management, Volume 2/2002
- Section of the Federal Waste Management Plan 2001: Guidelines on the shipment of waste and treatment methods or the new Federal Waste Management Plan 2006, part: Guidelines on the shipment of waste and treatment methods
- Guideline on the mechanical and biological treatment of waste, set of works published by the Federal Ministry of Agriculture and Forestry, the Environment and Water Management, vol. February 2002

GewO and MinroG:

General instructions on how to determine the BAT can be found in §71a par. 1 GewO and in §109 par. 3 MinroG. That a cost-benefit analysis of a certain measure is to be taken into account is explicitly mentioned only in the GewO. Annex 6 of the GewO contains a more detailed list of criteria relevant for the determination of the BAT. It states that among others the use of less waste intensive technologies and dangerous substances, the facilitation of recycling and re-use of the substances used or produced in the procedure and kind, amount and impact of emissions are to be considered when determining the BAT.

Sectoral orders (Branchenverordnungen) have been issued for various industrial sectors like cement production and foundries. These orders are often outdated and do not always correspond with today’s state of the art. For example for glass production the order was issued in 1994, the order for foundries in 1994. Recently new orders have been released for the production of cement, iron and steel. In practice many authorities directly apply the non-binding BREF-documents (see below) or the German Guideline for Air Pollution Prevention (Technische Anleitung zur Reinhaltung der Luft; TA Luft). This procedure is not explicitly defined leaving a large area of discretion to the authority which in turn can be problematic in the light of the legality principle.

BREF-documents produced by the EU joint research centre in Seville are non-binding documents used for guidance purposes. On the other hand guidelines issued in the form of an order are

binding. They are used to establish emission limit values according to the BAT for certain types of installations.

WRG (Water Act):

According to § 33b par. 3 WRG the Federal Minister for agriculture, forestry, environment and water management is competent to issue sectoral orders (Abwasseremissions-Verordnungen) which contain, in addition to emission limit values, a presentation of the applicable BAT for internal avoidance, retention and treatment methods. Annex G to the WRG contains a more detailed list of criteria relevant for the determination of the BAT.

7. Content of the request and permit

Request

IPPC-installations are authorized in the so-called “regular procedure” of the Trade and Industry Act (see Q3); therefore the request for authorization of an installation has to fulfill the criteria laid down for this procedure (§353 GewO).

In addition there are special provisions valid only for IPPC installations contained in § 353a GewO. This provision demands in particular the inclusion of detailed information on the expected emissions (sources, kind, amount, environmental effects, surveillance mechanisms, measures to avoid them) into the request. Apart from this the request should include other measures necessary to fulfill the requirements which have to be considered for a permit (see below). The applicant has to present the most important alternatives that were taken into consideration and has to provide for a comprehensive summary of the data provided under §353 and §353a GewO (§ 353a par.1 no. 9, 10).

Permit

For IPPC-facilities, additional requirements for authorization to the ones required in the regular procedure have been inserted into the GewO. § 77a par. 1 stipulates that the permit decision must ensure that when the installation is constructed, operated and shut down all suitable measures to prevent pollution are taken, in particular through the use of technological processes, equipment and operating methods corresponding to the state of the art techniques.

The permit also has to contain the basic information demanded for all facilities subject to permission under the GewO as well as additional information demanded only under the IPPC procedure.

Article 9 of the IPPC Directive was implemented in §77a par. 3 GewO 1994. This provision stipulates that at least emission limit values for pollutants mentioned in Annex 4 to the GewO must be contained in the permit decision, in so far as they may be released by the industrial installation in significant quantities, allowing for the potential to transfer pollution from one medium to another (water, air and soil). Requirements for the monitoring of emissions must be included in the permit decision and if necessary, appropriate requirements for protection of the soil and measures for abnormal operating conditions.

If necessary to stay within the limits environmental quality standards for emissions determined by community law, the permit has to prescribe obligations going beyond the “state of the art” (§77a par. 4 GewO).

8. Revealing the facts

Experts

A peculiarity of the Austrian system of the deployment of experts is the institution of the so-called “Amtssachverständiger” (official technical expert). On a provincial level these experts are often directly employed by the regional government, in other cases they are externals sworn to impartiality. The external experts are included into a list from which the authority can select. Both the directly employed as well as the external expert are referred to by the authorities to provide for expert reports for their area of expertise in authorization proceedings.

The same experts can be and actually are used by the project applicant to support the application. Incompatibility provisions ensure that this does not happen in the same procedure. Nevertheless a conflict of interest is obviously imaginable.

Pilot Operations

The GewO provides for pilot operations for installations or parts of installations. These pilot operations can be carried out before the actual validity of the permit decision if the conditions contained therein are fulfilled. This authorization is only temporary; it expires with the issuing of the decision over the appeal against the original permit--but in any case not later than three years after the delivery of the original permit to the project applicant.

This right can be ruled out if the reasoning contained in the appeal convinces the authority that due to specific circumstances of an individual case, a danger to life and health can be expected, even though the conditions contained in the contested permit decision are met (§ 78 par. 1 GewO).

§9 par. 5 EG-K is constructed in the same way as § 78 par. 1 GewO.

According to § 56 AWG pilot operations can be carried out before the actual validity of the permit if the conditions contained therein are fulfilled and only the project applicant has appealed against the permit decision.

Q9 Differences: Before and after IPPC regulations

The differences between activities before and after the IPPC regulations entered into force in Austria are marginal. The conditions for authorization and operation of installations were rather stringent before, therefore the standards were comparably high.

As another reason for the little impact the IPPC regulations have had on Austrian practice, generally speaking the transposition of the IPPC directive was not taken very seriously. The legislature has in most cases tried to integrate the new regulations into the existing structures of Austrian installations law thus avoiding a (necessary) structural reform of this area of law.

The only data on the number of IPPC installations in Austria that can be used for comparing the numerical development exist for the years 2003 and 2006 in the Austrian implementation reports to the Commission. In 2006, 585 existing and new IPPC installations were registered in Austria. In 2003 there were 477 installations covered by IPPC regulations. In 2003 36 new installations (excluding existing installations subject to substantial change) received a license. In 2006 there were 53.

10. Authorities participating in the procedure

The competent authorities are located on the provincial or regional level. The decision of first instance is taken either by the head of the provincial government, the provincial government as a collective, the district administrative authority or, as an exception, by the federal minister for economics and labor (mineral raw materials act).

The authority competent for appeals against the decisions of first instance (except if the Minister is in charge) is a quasi-judicial body called Unabhängiger Verwaltungssenat (Independent Administrative Senate of the respective Federal province, “tribunal” in the sense of ECHR).

11. Integration of permits

According to §356b GewO authorization proceedings for installations covered by this act are integrated procedures. Separate authorization procedures are not undertaken unless explicitly determined otherwise. Experts from the affected areas are to be consulted. The relevant provisions of other acts are nonetheless applicable (§356b par. 1 GewO). For permits necessary under provincial legislation the authority competent for the authorization has to coordinate the proceedings with other authorities (§356b par. 2 GewO). See also Q3.

12. Revision of the IPPC permit

In general the owner of an IPPC installation has to check within a time limit of 10 years if the state of the art relevant for his installation has changed. If this is the case the operator has to take appropriate measures if they are economically feasible. He/she has to immediately inform the authorities on what changes in the state of the art have occurred and which measures have been taken. If these measures are not considered sufficient by the authority it has to stipulate appropriate measures by means of a decision (§81b GewO, §121b MinroG, §57 AWG and §23 EG-K).

The competent authority can demand measures before the end of the time limit if substantial changes have arisen in the state of the art which may bring about significant emission control without proportionately high costs or operational safety necessitates the application of other techniques.

If the environmental pollution caused by the installation is so strong that new emission limit values have to be laid down, the authority has to demand from the operator appropriate measures (EG-K) or a plan for the implementation of appropriate measures (GewO, MinroG). If life and property are endangered by the pollution emitted from the installation or if the time limits for the determination of the state of the art were not met the authority can close down the installation or parts of it (AWG).

13. Data servicing of the operating facilities holding IPPC permits

The EPER Order (EPER-V, BGBl. II No. 300/2002) transposes Article 15 par. 3 of the IPPC directive in the Austrian legal system. It concerns all IPPC installations. The operators have to transmit their emission data of a reporting period (one year every three years) electronically, in most cases to the regional authority (§4 par. 1 and 2, §5 par. 3 EPER-V).

Generally access to environmental data in Austria is governed by the Environmental Information Act (UIG, BGBl No. 495/1993). This act is the legal basis for the transposition of Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment. The UIG was fundamentally amended following the adoption of the new EU-Directive 2003/4/EC of 28 January 2003 on public access to environmental information. Data or summaries of data have to be made accessible by the competent authorities (this can be a private company as well if it acts under the control of an authority) if they stem from the surveillance of activities, which have or most probably have an impact on the environment (§9 par. 2 no. 5 UIG). This is the general rule. The Federal Environmental Agency is named as the coordination office for environmental information (§10 UIG).

The transposition of the IPPC directive has led to an integration of more specific provisions concerning the provision of environmental information into Austrian law on installations:

Monitoring results concerning the release of pollutants can generally be inspected as environmental data by the authorities competent for the field of air pollution at the authority competent for the surveillance of the installation at any time and are made available to the public in the form of Federal Environmental Agency reports (§17 par. 3 EG-K).

Emission data for installations falling under the waste management act are published in the Pollutant Release and Transfer Register (PRTR) (§ 60 AWG).

For information on access to information concerning procedural questions please see below under Public Participation.

14. Public participation

Public participation is a procedural step in the Austrian IPPC-permit proceeding. The permit proceeding is regulated in §§ 77a et seqq and 356a et seqq of GewO. Similar provisions are regulated in Waste Management Act (AWG 2002) and in the Mineral Raw Materials Act (MinRoG) (read Question 2 two for details). Respective provisions regulate additional and slightly different procedural and substantive requirements for installations.

The procedure is as follows:

The developer submits the IPPC development consent request to the competent authority (regional authority).

After that the authority has to announce the request and additional pertinent information in two major newspaper of the region and on the Website of the authority (§ 356a GewO). The announcement needs to include the following information (public display):

- Information that there is an IPPC permit request and the request and all supplementing information and documents are available at the premises of the authority for the period of six weeks starting at a date after the announcement and that everyone can make comments within six weeks to the available documents.
- Notification that the proceeding will end with a permit decision
- Notification that additional documents and information that come up during the permit proceedings are always available at the authority
- Information that trans-boundary consultations might be necessary

- The public concerned has standing and access to justice in the permit proceedings (please read below about limitations).
- Oral proceedings with participation
- The authority issues the permit.

The permit has to be published (following the procedure of point 1.; six week public display, announcement in two major regional newspapers).

The developer and standing parties may appeal against the decision to the regional administrative court. Interim relief is granted as a rule.

It has to be noted that through access to justice rights it is more or less guaranteed that Austrian and European environmental law is applied and that obligatory procedural steps are taken by the authority.

Who is the public concerned?

The public concerned is defined as neighbors and NGOs, registered at the Ministry for Agriculture, Forestry, Environment and Water Management according to the Austrian EIA act.

The general public has no right to participate.

Neighbors have standing if they are directly affected by the installation (§ 75 GewO). Their standing rights are limited to rules that serve to protect them (in particular their health and property; typically noise, smell etc). Public interest legislation (like for example air quality or water quality standards, nature protection) is not subject to their standing rights. Neighbors have to submit comments opposing the IPPC-permit request within the six week period of public display (read above). All major issues (like noise, smell) have to be brought up in the initial phase, otherwise neighbors lose respective standing and access to justice rights (for example: if a neighbor does not raise the issue of noise in the initial phase of the proceeding, it can claim on noise problems later in the proceeding or at the court).

NGOs have standing if they are registered after the procedure of the Austrian EIA-act (please read J&E Workplan 2006 legal analysis on the Aarhus Convention in Austria for details). NGOs have to register at Austrian Ministry of Environment. The registration is supposed to take place before IPPC-proceeding start. Once an NGO is “registered” according to the proceeding regulated in Article 19 of Austrian EIA-act it has the right to have standing in all federal EIA- and IPPC-proceedings. Like neighbors NGOs have to submit opposing comments within the six week public display period.

For registration an NGO has to “prove” that their primary objective is the protection of the environment, that is non-profit oriented, and that it has existed and pursued the objective identified for at least three years. Until now approx 25 NGOs have been registered at MoE.

The standing and access to justice right are much broader as compared to neighbors and include the protection of environment and respective legislation. It has to be noted that from our understanding only the NGO provisions are in compliance with the Aarhus Convention and IPPC-directive. Since neighbors rights exclude the right to protect the environment the interpretation that only NGOs are defined as the “public concerned” is too narrow for proper interpretation the Aarhus related issues.

Public participation and revision

Only “significant” amendments” of an installation is subject to public participation and access to justice (§ 359b paragraph 7 GewO). The 10 year due permit revision itself is not subject to public participation and access to justice. The public concerned has no right to request the operator and the authority respectively to revise IPPC-permit.

15. Secret protection

The Environmental Information Act allows restrictions concerning access to environmental information under the conditions of §6 UIG. Article 3 par. 2 and 3 par. 3 of the Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment allow for exceptions to the duty to supply environmental information. §6 par. 1 UIG mirrors the wording of Article 3 par. 3 of the Directive. §6 par. 2 UIG also repeats to a high degree the wording of Article 3 par. 2 of the Directive leaving out the provision about material supplied by a third party without that party being under a legal obligation to do so.

If company or business secrets are in question a special procedure introduced by §7 UIG has to be followed. If a communication on environmental information could be affecting such secrets, the consulted authority has to inform the owner of this information on the query it received. The owner then has to decide within two weeks, if the information contained in the communication shall be kept secret. He/she has to provide reasons for this interest (§7 par. 1 UIG). The authority then has to decide by verification of the provided reasoning and a weighing of interests, if the information is eligible to be kept secret (§7 par. 2 UIG). According to §6 par. 3 UIG the interest of the owner of company or business secrets is only worthy of protection if their publication would cause a more than negligible economic disadvantage.

The GewO provides for specific rules concerning secret protection in the authorization proceedings for installations. When informing the public about the application for the authorization of either a new installation or of substantial changes of an existing installation, the authority has to ensure that company or business secrets are protected (§356a par. 1 GewO).

The same is true when the public is informed about the upcoming permit decision and the right of access to information concerning these proceedings (§77a par. 5 GewO).

If dangerous substances are used when operating the facility the operator has to draft a security report as well as an index of the substances used. These are to be made public but the parts concerning company or business secrets can be excluded from publication (§84c par. 10 no. 2 GewO).

A radical limitation of public participation rights is determined by §356 par. 2 GewO: If in the process of the (oral part of the) authorization proceedings an inspection of the facility is carried out and company or business secrets could be affected, neighbors can only enter the premises with the permission of the operator. This provision provides for a large area of discretion of the operator who will be able to exclude the neighbors concerned in a lot of cases.

16. Sanctions

The GewO provides for temporary mandatory and safety measures as well as administrative penalties in case of non-compliance with the law. §360 GewO allows the authorities to impose

temporary mandatory and safety measures, which may extend to closure of the whole installation in cases mentioned, amongst others, in §366 par. 1 no. 1,2,3 GewO. The procedure is as follows:

First the authority has to demand the establishment of a situation in conformity with the law within a “reasonable period of time”. The authority has the sole power of decision concerning the duration of this time limit. If the operator does not follow this request the authority has the possibility to implement appropriate measures by means of a decision. §366 par. 1 no. 1 GewO applies to the exercise of a business without business license; §366 par. 1 no.2 GewO concerns cases in which an installation, which is subject to authorization, is constructed and operated without a permit and § 366 par. 1 no. 3 GewO prohibits unauthorized changes to an authorized installation. In these cases administrative penalties of up to EUR 3.600 may be imposed.

Other cases of non-compliance are covered by §§ 366 par. 1 no. 5-7 and 367 GewO. A catchall clause contained in §368 GewO allows for administrative penalties of up to EUR 1.090 in all cases of non-compliance not covered by the provisions mentioned above or orders and rulings enacted on the basis thereof.

With § 178 the MinroG contains a similar provision as §360 GewO. It allows the authorities to impose temporary mandatory and safety measures, which may extend to closure of the whole installation. §193 MinroG provides for sanctions which can add up to EUR 72.600 in cases where the infringement of administrative provisions has led to death or heavy injury. Generally the unauthorized operation of a mining facility is sanctioned with up to EUR 3.600.

Pursuant to § 26 of the Pollution Prevention from Steam Boilers Act (EG-K), a fine of up to € 7,260 is threatened when a party, amongst others, fails to observe the emission limit values laid down for the installation, does not have his installation monitored or fails to comply with other requirements or bans of this federal act or orders or decisions enacted on the basis thereof. If the emission limit values are exceeded, thereby jeopardizing the lives and health of people or property or other rights of the neighbour or an unreasonable burden is placed on the neighbor, the authority shall order by means of a decision that operation is restricted or suspended until such time as operation in accordance with regulations is possible again (§13 par. 6 EG-K).

In all other cases the authority shall grant a reasonable period of time to establish a compliant situation. If this order is not complied with in this period of time, the procedure described in §13 par. 6 EG-K shall be followed by analogy (§13 par. 7 EG-K). If the operator continues to be in breach of the law despite being punished on at least three occasions, the authority shall issue a decision ordering the installation be shut down (§13 par. 8 EG-K).

Apart from the above mentioned administrative proceedings Austrian criminal law contains provisions criminalizing the endangering and damaging of the environment. Especially relevant for installations law are §181d and §181e Austrian Penal Code which apply to the intentional (in the Austrian interpretation meaning “seriously consider possible and accept”) and negligent endangering of the environment by operation of an installation. Penalties are considerably higher than under the administrative procedure and prison sentences can amount to 3 years.

Due to the relatively limited practical importance of these provisions, this analysis will not go into more detail.

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