



# Integrated Pollution Prevention and Control Position Paper 2007



## 1. Background

According to the 2007 annual work program of the Justice and Environment network, three member organizations, EMLA (Hungary), Ökobüro (Austria) and EPS (Czech Republic) developed a detailed legal analysis of their respective IPPC laws and a case study in each country.

This Position Paper is based on the results of that program and was finalized during an extensive exchange among the participating organizations. After presenting this abbreviated background information concerning the program and European IPPC law, we will submit a summary of legal problems in the three countries from environmental NGO viewpoints. We also make suggestions and propose a guide to best practices for the attention of our governments, environmental lawyers, NGO communities and similar stakeholders in other EU countries.

The fourth Environmental Action Program (1987) of the EC changed the earlier sectorial approach into the integrated approach and explored a European integrated pollution prevention legal regulation. In that spirit the Commission issued a draft to the Council in order to further develop an already existing directive on environmental impact assessment, in September, 1993. After much negotiation, on 24 September 1996 the Council passed Directive 96/61/EC on Integrated Pollution Prevention and Control.

Integration is a concept in European environmental law that has many faces. Within the IPPC the two most important readings of this concept are

- a) an integration of the scattered permitting procedures of environmental protection administration and, if possible, of closely related further administrative branches,
- b) an integration of the management of the environmental issues during the operation of the installations, in order to prevent the shift of environmental burden from one environmental media to another in case of changes in the relative seriousness of the legal consequences of pollution within certain branches of environmental law.

In certain aspects *Best Available Technique*, the central element of the IPPC system is also a legal institution with holistic approaches, because the developers and authorities using information based upon BAT, strive to find the best solutions from the viewpoints of the whole environment.

Another key element of IPPC is information servicing; working through and dissemination of information on the most polluting operations in each country, possibly comparing the performance of installations in the same industries. Nevertheless, this project puts minor emphasis on the so called EPER rules, because we consider that this is a separate issue together with the PRTR Protocol to the Aarhus Convention and the EU PRTR Regulation.

## 2. Problems

### a) Positioning the IPPC procedure in the chain of planning and permitting procedures of large environmentally significant investments

In the **Hungarian** planning and permitting system the EIA and IPPC are taking place practically in one single (merged or directly consecutive) procedure. In the **Czech** system of environmental planning and permitting the IPPC procedure comes right after the EIA but it can encompass some kinds of permits that precede the EIA procedure.

The **Austrian** legal situation seems the most problematic from this viewpoint, because the Austrian legislation did not fully standardize the laws on installations, but amended a series of sectorial laws on permitting the relevant installations. Thus the Integrated Pollution Prevention and Control is not yet properly integrated in Austria.

Justice and Environment notes that there are further possible arrangements in Europe, namely in **Lithuania**, where the IPPC comes after the construction is complete. In this way IPPC is part of the usage permitting procedure or strongly related to it. Upon the request of interested parties in one specific case, the EU Commission held that this interpretation is not contrary to the IPPC Directive<sup>1</sup>.

We disagree with the Lithuanian approach for the following reasons:

- The basic integrative nature of the IPPC legal institution:  
because it integrates several permits that precede the actual construction, we feel that IPPC may not be allowed to *follow* construction. Allowed *after* construction is performed, the majority of the permits *cannot integrate* into the IPPC procedure. Therefore it loses its basic legal features and cannot serve its original purposes;
- BAT, another basic element of IPPC, refers to the design and construction of installations, not only to their operation and maintenance;
- The legal history of IPPC, especially the original will of the Commission to further develop the EIA procedure and the basic underlying principles of IPPC. The prevention principle *first of all* makes unimaginable to us an IPPC *after* construction;
- Because there is a kind of IPPC procedure for existing installations, *a contrario* concludes that the *other kind* of IPPC procedures shall be used for planned (“not yet existing”) installations;

We disagree with merging IPPC and EIA or bringing them too close, let alone the (fortunately, only theoretical) version of bringing IPPC ahead of EIA.

EIA, in our view is a planning tool, where the main issues should be the siting and nature of the investment, in cases where developers have not yet committed themselves to alternatives. IPPC should deal with *specific* development (on an already decided site with an already determined type of activity); namely with design of detailed technical issues relevant to emissions and other environmental effects of the investment.

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<sup>1</sup> The question was raised at the Aarhus Compliance Committee as well, where the cases are still pending (see at the [www.unece.org](http://www.unece.org) home page the cases No 17 and 21 against Lithuania and the EU respectively).

Therefore, while EIA should be at the very *beginning* of a specific (individual) investment plan, IPPC should be among the *last* planning/permitting administrative tools, just before the start of construction.

In this manner, the latest technical achievement for optimal environmental performance can be used in each IPPC case.

**b) Activities of Governments contrary to the non-retrogression principle**

While the *non-retrogression* principle is more and more widely acknowledged in international and national environmental law,<sup>2</sup> we see some signs that our Governments retreat in environmental legislation whenever it seems possible in lenient international legal surroundings. This happened in the Czech Republic in 2004, as legislation narrowed the categories of activities within the chemical industry, subject to IPPC.

**c) Regulations and practices against the equal procedural position of stakeholders in the cases**

Under Hungarian law the BAT requirements are established in every case with a multi step consultation procedure involving the lead authority and the developer, possibly including some consulting authorities. The other participants, NGOs, local municipalities, etc. are excluded from these negotiations. This is apparently against the principle of fair (evenhanded) procedure.

**d) Expert opinion is ensured by the developer – bias cannot be excluded**

In the Hungarian EIA-IPPC cases, fact finding is primarily based on private expert studies prepared by the developer or by experts commissioned by the developer. Independent experts are involved extremely rarely in the procedure, even if general administrative law makes it possible. Meanwhile, expert officials working at the environmental inspectorates and at the consulting authorities can only supervise already completed examinations, because of their very limited time and technical equipment.

In an overwhelming majority of cases, neither the participating municipalities nor other stakeholders, such as NGOs or local citizen groups are in a position to hire competent experts to evaluate documentation prepared by the developers' experts.

In this way, the expert/professional background of the IPPC (and EIA) decisions serve first the interests of investors and conditions supportive to a fair decision are all too frequently missing or unsatisfying.

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<sup>2</sup> See the legal standpoint of the Second Meeting of the Parties of the Aarhus Convention (2005, Alma-Aty) in connection with Case No. 5 on the homepage [www.unece.org](http://www.unece.org) or the widely quoted decision of the Hungarian Constitutional Court No. 28/1994. AB with the argument that Governments shall not take back the level of legal and institutional protection of the environment (as might be well possible in case of other constitutional rights) because those subject to protections of the environment that Governments abandon, might not be available for protection later.

**e) Revision of the IPPC permit**

Revision of the permits, if necessary, takes place every

- 5 years in Hungary,
- 8 years in the Czech Republic and
- 10 years in Austria,

without change in the administrative legal conditions of the operation. There is no mandatory expiration of IPPC permits in any of the examined laws.

This legal arrangement is contrary to the basic considerations behind the legal institution of IPPC. While legislatures declared that quick development and changes in construction technique demand frequent adaptation of the conditions for the operation of large, environmentally significant installations, the actual rules of revision of the permits do not follow the spirit of IPPC laws.

**f) Unnecessary restriction of public participation**

While Hungarian environmental laws ensure wide access to public participation, the court practice tries to “balance” it by limiting subjects the NGOs can raise in courts. Hungarian law acknowledges on one side that certain construction permitting cases are environmental, therefore environmental NGOs have standing, the courts determine issues where they may not intervene during the revision procedure. Such issues are (for instance) certain technical solutions and may include the number and location of parking lots, as well.

The Czech environmental law ensures access to justice in the IPPC cases only for the public in a “narrow sense”, i. e. civic associations, public-benefit societies, federations of employers or chambers of commerce, whose spheres of interest are connected with environmental protection. We note that extending public participation rights to such organizations that represent primarily business or labor interests is a “second bite from the same apple”, because trade unions and business chambers have effective ways of influencing administrative decisions beyond public participation.

**g) An uncontrolled number of secrets in the legal systems**

If someone types in the word “secret” into the electronic search-function of the Hungarian CD law collection, 1478 results are returned. Ten years ago this number barely exceeded 400. This means that every small branch of administrative law and other laws short-sightedly protects their particular interest from outside “intruders”. Meanwhile, there is no comparison of the sheer contradiction of this situation with the basic constitutional rights of citizens and with the general and environmental-specific freedom of information laws.

### 3. Suggestions, good practices

#### a) Determination of basic structural issues and principles as the starting-point of any further revision to our IPPC systems

Since IPPC is a modern environmental legal instrument that is subject of continuous refinement and modification, we suggest that the following round in the modification of IPPC regimes in our countries shall be designed in a way that begins with pinpointing basic principles and theories behind the actual legal arrangement. First, the best position for IPPC procedures within the chain of planning/permitting decisions prioritizes effective control of the design over environmentally significant large investments.

#### b) A good network of IPPC references in the relevant environmental laws and laws with strong environmental aspects

With the same search-method as in the previous point, the Hungarian study revealed that the term “IPPC” is mentioned in 47 laws in the Hungarian legal system, including

- environmental laws, like Act on Nature Protection, the 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.

What is even more important, there are other laws referring to the IPPC procedure or to 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 means that IPPC is more or less organically fit into the legal system rather than behaving as an alien body within it. This results in an effective implementation of the Hungarian IPPC laws and (on a more general scale) a better fulfillment of the requirements ensuing from the integration principle.

#### c) A substantial use of BAT

In the Czech Republic, BAT is a complex tool in the permitting procedure, the applicant comparing its systematic technology with that of BAT. This is contrary to Hungarian law, where BAT is merely a formal reference to conclude the emission limits in decisions that are always identical with legal standards.

#### d) Fair fact-finding and expert opinions shall be ensured

In countries where the basis of IPPC (EIA) procedure is professional documentation prepared by the experts of the developer, fair procedure shall be ensured by essentially changing this regime. While the polluter pays principle (PPP) can be maintained by the solution that experts are paid by the developer, the experts shall be nominated (or hired)

by the environmental authorities and they shall work without influence from the clients or other interested persons.

Also we offer consideration of the Austrian solution, where authorities use official technical experts in IPPC procedures. These experts are generally employed by regional governments, but impartial external experts are sometimes hired from a list at the authorities.

**e) Good practices in public participation**

In Hungary, the well known and frequently used Article 98(1) of the Environmental Code ensures *standing* for the environmental NGOs in environmental administrative cases. 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 as environmental once the environmental authorities take part in it, either as lead-authority or consulting-authority.

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

**f) Burden of proof on the owner of the sensitive information**

According to the *Austrian Environmental Information Act* in case of a public information request, if the information servicing could affect sensitive information, the consulting authority shall inform the owner of the information on the request it received. The owner has two weeks to respond and provide convincing reasons concerning their interest over the secrecy of the requested information. The authority then has to decide on the matter, weighing the interests on the side of the owner of the information against the public interest, with a stress on the latter.

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