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TRANSITION

DIRTY SKIES ABOVE:

REGULATION OF AIR POLLUTION IN UKRAINE AND THE EU

Comparative study of law, policy, and practice

PRAGUE–KYIV 2020

Air pollution regulation in Ukraine

- International legal framework (Aarhus Convention)
- EU obligations (Industrial Emissions Directive, approximation process)
- National laws (transposition of *EU environmental acquis*)

Aarhus Convention (1998 adopted in Aarhus Denmark, 1999 ratified by Ukraine)

- Not merely an international agreement, also convention about accountability, transparency and responsiveness
- Grants public rights and imposes on parties and public authorities obligations regarding public access to information and public participation and access to justice
- Ukraine found non-compliant, excluded from the non-compliant list when it enacted the Law on Environmental Impact Assessment in 2017

Three pillars of Aarhus Convention

i. The right of everyone to **access** environmental **information** held by public authorities

i. The right to **participate** in environmental **decision-making**

i. The right to **review** procedures to **challenge public decisions** (irrespective the two aforementioned rights or environmental law in general)

Scope of access to information

‘‘Public concerned’’ x ‘‘Protected data’’

- **Everyone** (individuals, associations) can access environmental information held by public authorities
- Practically (during the IPPC process) it might entail two forms of public participation:
  - *The right of the general public, i.e., to comment on the submitted integrated permit application, and*
  - *“Full-fledged” participation in the IPPC process, including the right appeal and to initiate review before administrative courts*

Scope of access to information

Operator's interest in protection of business secrets vs. public's right to access information

- The possibility to acquaint oneself with the submission documents relevant for a decision is a prerequisite to an effective participation in the IPPC process
- Certain public interests (typically business secrets) might be at stake
- Permitting authority shall ensure the protection of business secrets, personal data, and other data protected pursuant to special laws and regulations
- The permitting authority shall actively ascertain whether the information marked as confidential really fulfils the confidentiality criteria set by law (not merely rely on operator's declaration)

EU environmental acquis

- Association Agreement between the EU and Ukraine od 2014 (Chapter 6 - Environment)
- Ukraine is obliged to implement a number of EU Directives in the field of environmental protection, including Industrial Emissions Directive
- The approximation process includes the following changes:
  - *Legislative (e.g. preparation and adoption of BAT)*
  - *Technical (e.g. definition of facilities requiring an integrated permit and creation of pollutant register)*
  - *Organizational (e.g. framework for enabling public access to information and participation to environmental decision-making)*
- Ukraine significantly lags behind the timeline to implement the IE Directive and Association Agreement requirements

Industrial Emissions Directive

- lays down rules on **integrated prevention and control of pollution** arising from industrial activities
- **IE Directive requirements:**
  - ***Integrated*** *prevention and control of pollution arising from the activities listed therein*
  - *No new installations may operate without an integrated permit*
  - *The conditions of the permit shall be determined and the installation operated through the application of the* ***best available techniques (BAT)***
  - *Substantial changes in the operation require a permit*
  - *Access to information and public participation*
  - *Access to justice*

Integrated vs. fragmented approach to environmental permitting

- Better overall solution

(Int. | Frag.)

Comprehensive review of the facility's operations
= better ways of controlling the overall environmental impact of production process

A permit covering pollution to a single environmental medium (e.g. reducing air pollution) may cause a spillover effect to other environmental media (e.g. increasing water pollution)

- Efficiency

(Int. | Frag.)

Reduces administrative costs for both regulatory agencies and regulated facilities

May be time-consuming, costly, and demanding in terms of staff dispersed in different agencies

Integrated vs. fragmented approach to environmental permitting

- Pollution prevention

(Int. | Frag.)

Integrated and comprehensive facility assessment is likely to prevent pollution

Simply imposing "end-of-pipe" controls on facilities' different environmental media may leave loopholes in other aspects of their production

- Sustainability

(Int. | Frag.)

Operational aspects such as natural resource use, the generation and recovery of waste, and habitat impact may promote long-term sustainability

Disregarding operational aspects or considering them marginally may lead to short-term or non-comprehensive sustainability

Integrated vs. fragmented approach to environmental permitting

- Public participation

(Int. | Frag.)

Providing stakeholders with a broad, facility-wide assessment of environmental impacts facilitates public participation and fosters a comprehensive dialogue among industry and other stakeholders

Requires participation in several separate and time-consuming permit processes

Development of integrated approach in the EU

Environmental action programmes of the European Commission	EIA Directive	IPPC Directive	IE Directive
Identified the need to shift from the traditional fragmented (sector-by-sector) approach to integrated pollution prevention and control; no definition of the integrated approach yet.	The first piece of legislation that proposed concrete, cross media-oriented measures and a holistic (rather than sectoral) approach to environmental protection; no use of the terms integrated pollution prevention or control.	The first directive that defined integrated pollution prevention or control.	Streamlines and underscores the principles contained in the IPPC Directive.

Which operations to license?

- **Only** industrial and agricultural **operations** (e.g. energy, metals, minerals industry, chemical industry, waste management, livestock farming) **exceeding the threshold values** stated in the IE Directive require an integrated permit

- The **intention** is **not** to **license all** industrial and agricultural **activities**, but only those with a high pollution potential

- **Ukraine licenses** even operations with **negligible environmental impact** that would not otherwise fall under the IE Directive

Which license to issue?

- The goal is to issue **one** comprehensive **integrated permit**
- Ukraine counts with:
  - *“integrated” permit – for categories of activities included in Annex I, points 2-4 of the IE Directive (energy, metals, minerals industry)*
  - *unified permit - activities under Annex I and Annex 7 parts 2-4 of the IE Directive*
  - *registration – applicable to small-scale installations with negligible environmental impact*

How to determine integrated permit conditions?

- Under the IE Directive, the integrated permit conditions are set on the basis of the **best available techniques (BAT)** and **BAT reference documents (BREFs)**

  - ***BAT*** - ***framework indicator*** *reflecting the most efficient and advanced stage of development of particular technology, activities, and their method of operation, which indicate their practical suitability for preventing or reducing emissions and its impact on the environment (**case specific** framework)*

  - ***BREFs*** - *BAT for a given industrial sector are described in BAT reference documents (BREFs) adopted by the European Commission*

How to determine integrated permit conditions?

- In Ukraine, the permit conditions are set on the basis of **maximum allowable emissions (MAE)** and **technological maximum allowable emissions (TMAE)**

  - *Maximum allowable emissions (MAE) – the volume of pollutants that should not be exceeded per unit of time, elaborated by the Ministry of Environment for certain types of equipment*

  - *Technological maximum allowable emissions (TMAE) – the maximum allowable volume of emissions that is approved by the Ministry of the Environment for specific technological processes that do not fit into the standard MAE*

- MAE and TMAE are calculated on the basis of the average emission figures for the types of equipment where the volumes of such emissions are the lowest. MAE and TMAE are set as binding standards and it is prohibited to derogate from them.

Air pollution monitoring in Ukraine

- National legal framework (Law on Atmospheric Air, CMU's decrees)
- EU obligations (Association Agreement, EU Directives)
- National laws (transposition of *EU environmental acquis*)

Key problems

- Proper air quality monitoring is missing
- Legal framework is outdated
- Approximation process is slow
- Monitoring procedures are not synchronized

Legal framework

i. The law “On the Protection of Atmospheric Air” (1992)

- *Air quality monitoring system is a part of the state environmental monitoring system; its structure and responsible bodies are defined by decrees issued by the CMU.*
- *The monitoring concerns:*
  - *Installations having a negative impact on human health and the quality of air*
  - *Types and volumes of pollutants*
  - *Types and extend of influence of physical and biological factors on the atmosphere.*

Legal framework – CMU's decrees

ii. Approval of Provision about State Environmental Monitoring System (1998)

iii. Some Issues of State Monitoring in the Field of Atmospheric Air Protection (2019)

iv. Order of State Monitoring in the Field of Atmospheric Air Protection (2019)

EU-Ukraine Association Agreement

- Air quality among the priority areas (article 361)
  - *Implementation of Directive 2008/50/EC*
  - *Implementation of Directive 2004/107/EC*
    - *Relevant legislation and competent authorities*
    - *Upper and lower assessment thresholds, target and limit values*
    - *Zones and agglomerations*
    - *Air quality plans for zones and agglomerations*
    - *System to provide information to the public.*

Procedure 827/14.08.19

- lays down rules on **monitoring of atmospheric air and its quality.** Complies with the EU Directives 2008/50/EC and 2004/107/EC
- **Key provisions:**
  - *Monitoring and management of air quality based on zones plus agglomerations principle*
  - *Responsible air quality authority established in every zone and agglomerations*
  - *Assessment regimes for each zone and agglomeration are defined*
  - *Information and analytical data system on air quality*
  - *Limit values of air pollution levels are defined*

Procedure 827/14.08.19

- **Key provisions:**
  - *List of pollutants extended: PM2.5, PM10, and ozone*
  - *New network of monitoring posts that correspond to European requirements*
  - *Development of monitoring programmes for zones and agglomerations every 5 years.*

Procedure 827/14.08.19

- **Responsible institutions:**
  - *The Ministry of Ecology and Natural Resources*
  - *The Ministry of Health*
  - *The State Emergency Service of Ukraine*
  - *State Agency on Exclusion Zone Management*
  - *Executive bodies of oblast and city administrations*
    - *Departments*
    - *Committees*
- ***Enterprises***

Procedure 827/14.08.2019

- **List of monitored pollutants**

(Group A (13) | Group B (20))

Sulphur dioxide
Nitrogen dioxide
Benzene
Carbon dioxide
Lead
Particulate matter (2.5, 10)
Arsenic
Cadmium
Mercury
Nickel
Benzopyrene
Ozone
Ammonia
Aniline
Hydrogen chloride
Hydrogen cyanide
Iron and its compounds
Nitric acid
Sulfuric acid
Xylene
Volatile organic compounds
Copper and its compounds
Hydrogen sulfide
Phenol

Access to air quality information

- European Air Quality System
  - https://www.eea.europa.eu/themes/air/air-quality-index

Environmental inspection in Ukraine

- Control and regulation (the SEI)
- Reform plans (the SEI or the SEPS)
- Reform plans (modernized SEI)

State Ecological Inspectorate

- **Key responsibilities:**
  - *State supervision (control) in the field of environmental protection, rational use, reproduction, and protection of natural resources*
  - *State supervision (control) over compliance with the requirements of environmental legislation*
  - *Development of decrees and draft laws.*

State Ecological Inspectorate’s reform

- ***Key objective*** *is to create a new institution that would be task with preventing environmental pollution rather than punishing.*
- ***Introduction of monitoring system***
- ***New approaches towards regional organization, mechanisms of monitoring and control***

State Ecological Inspectorate’s reform

- *New territorial organization*
- *Personnel changes*
- *Increased fines*
- *Establishment of an Office of Industrial Supervision*

SEI’s reform

- *Legislative changes:*
  - *Draft law #3091 “On the State Ecological Control”*
  - *Amendments to the Code of Ukraine on Administrative Offenses (increased fines)*

Thank you for your attention!

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