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REVIEW

Prerequisites and certain aspects of implementation of an integrated approach to regulating industrial pollution in Ukraine

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Abstract

The piece explores the prerequisites of implementation of an integrated approach to regulating industrial pollution in Ukraine as well as provides an insight into the legislative proposals on introduction of the integrated environmental permits currently under consideration in the Parliament of Ukraine. The article argues that the proposed regulation corresponds to the respective EU acquis, including the Aarhus Convention. Given that the post-war reconstruction assistance has already been clearly anchored in the green and digital transitions as well as other fundamental European values, it is the authors' conclusion that the new legal framework on reduction, prevention and control of industrial pollution will be introduced in Ukraine in the nearest future.

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1 Introduction

According to the 2030 National Economic Strategy of Ukraine¹, adopted about a year before Russia's unprovoked and unjustified military aggression toward Ukraine began, Ukraine's national economic policy included "ensuring mutually beneficial trade with the world, achieving expanded access to foreign markets, increasing the competitiveness of Ukrainian goods and services, creating a positive image of the country, ensuring the presence of Ukrainian producers in international markets, [as well as] ensuring a high level of health, high indicators of life expectancy, and healthy life expectancy". With aims of reaching the European standard of living, the Strategy emphasised the need to lay the foundations for economic development, ensuring at least one and one-half to two decades of accelerated growth in order to make up for lost ground. Transformed and highly productive sectors of the economy were expected to compete effectively in the international market of goods and services with other countries, helping to increase tax revenues and incomes. Focus on new approaches to overcoming linear production and consumption models, development of a circular economy based on renewable resources, designing out waste, the application of technologies and management methods that prevent and reduce adverse impacts on the environment and human health were deemed by many as the only way to the sustainable development of Ukraine.

The war, however, has taken its toll. According to the Kyiv School of Economics, the direct damage caused to Ukraine's infrastructure during the war has reached over \$105.5 billion². Since late February 2022, at least 227 enterprises, plants, and factories have been damaged, destroyed, or seized. Several 19th and 20th century heavy industry installations, especially in the East and the South-East of Ukraine were completely destroyed, many of which will have to be rebuilt from scratch.

Although the war has not yet ended, the Government of Ukraine (hereinafter – the GoU), the European Union, and other international partners of Ukraine are already developing the framework for the future post-war reconstruction of the country. According to the recently released Communication³ from the European Commission 'Ukraine Relief and Reconstruction', the

reconstruction shall be anchored in the green and digital transitions and fundamental European values. According to the U-24 Ukraine Recovery Plan⁴, which is being developed by the GoU, the reconstruction shall be based on two main principles: the regional and the parametric. The regional approach (or regional principle) is about partners helping Ukraine in rebuilding and reviving particular regions, cities, or communities; while the parametric approach (or parametric principle) is about rebuilding according to the state of art and contemporary parameters and standards of the European Union. In terms of the industrial pollution prevention and control, the Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (hereinafter – the IED)⁵ provides for such approaches and principles.

2 Transposition of the IED in Ukraine

The implementation of the IED in Ukraine is laid out in the 2014 EU-Ukraine Association Agreement⁶. In 2019, the GoU approved the Concept of State Policy in the Field of Industrial Pollution⁷ and the Action Plan⁸ in order to consistently implement the IED.

2.1 Early legislative initiatives

In pursuance of the Action Plan and the Decree of the President of Ukraine on November 8, 2019, # 837 'On urgent measures to reform and strengthen the state'⁹ (paragraph 7a of Article 1.1) in 2019 the GoU developed the draft Law of Ukraine on Prevention, Reduction and Control of Industrial Pollution¹⁰ (ref. # 3117). It introduced the IED by providing approaches to the reduction of industrial pollution through a new permitting system (integrated permit), free access electronic register, and sectoral regulation (based on BAT). Despite the fact that the draft Law 3117 was withdrawn from the Parliament due to

¹ 2030 National Economic Strategy of Ukraine.

² Kyiv School of Economics, 2022.

³ Communication from the Commission, 2022.

⁴ Denys Shmyhal presents the basic aspects of the Ukraine Recovery Plan and Fund, see Communications Department of the Secretariat of the CMU, 2022.

⁵ Directive 2010/75/EU.

⁶ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part.

⁷ Concept of state policy in the field of industrial pollution approved by the order of the Cabinet of Ministers of Ukraine dated 22.05.2019 № 402.

⁸ Action plan for implementation of the Concept of state policy in the field of industrial pollution, approved by the order of the Cabinet of Ministers of Ukraine dated 27.12.2019 № 1422.

⁹ President of Ukraine, Decree № 837.

¹⁰ Draft Law, ref. # 3117, February 24, 2020.

resignation of the GoU, its provisions formed the basis for the subsequent draft laws on this matter, which were registered in the Verkhovna Rada of Ukraine¹¹.

The draft Law on Prevention, Reduction and Control of Pollution Arising from Industrial Activities (ref. # 4167)¹², which was considered and revised several times in the Verkhovna Rada of Ukraine during 2020-2021, ran just a few votes short due to a strong industrial lobby.

2.2 Draft Laws under consideration

In autumn 2021, the draft Law on Integrated Prevention and Control of Industrial Pollution ref. # 6004¹³ and two alternative draft Laws ref. # 6004-1¹⁴ and ref. # 6004-2¹⁵ were registered by the members of the Verkhovna Rada of Ukraine. Since, in our opinion, the draft Laws 6004 and 6004-2 generally comply with the IED, while the draft Law 6004-1 contains a number of provisions that do not meet the IED requirements and simultaneously contradict other international obligations of Ukraine, the present article analyses the model proposed by the draft Laws 6004 and 6004-2, as well as some of the differences offered in draft Law 6004-1.

3 Key features of the reform

The draft Laws 6004 and 6004-2 establish the legal framework for an integrated environmental permit. This includes a list of activities requiring the integrated environmental permit, and the procedure and grounds for granting and revoking such a permit. Other key features include the grounds and procedure for amending the integrated environmental permit, the requirements for the register of integrated environmental permits, the monitoring and control of emissions under the integrated environmental permit, and definite cessation of the activity and clean-up of the site. The IEP are to be based on the BAT conclusions, which in content, form, and structure match the EU BAT conclusions. The draft Laws provide for appropriate timeframes for the implementation of the BAT conclusions and the transition to new standards, introduce a transparent electronic permitting system, and provide opportunities for long-term investment planning in environmental measures for business.

As previously suggested by the academics¹⁶ the proposed integrated environmental permit system absorbs three major environmental permits: a permit for emissions of pollutants into the ambient air by stationary sources; a special water use permit (which,

inter alia, regulates discharges into water); a waste management permit.

According to the approach embodied in the draft Laws¹⁷, further implementation of the IED will require the adoption of by-laws aimed at transposing technical requirements and annexes governing the operation of incinerators, waste incineration plants, co-incineration plants, installations and activities in which organic solvents are used, and installations producing titanium dioxide.

3.1 Main elements of the permitting procedure

The procedure for granting (or updating) the integrated environmental permit, proposed by all draft Laws currently registered in the Verkhovna Rada of Ukraine (6004, 6004-1, 6004-2), is similar in logic and sequence of steps. Therefore, the present article considers the model enshrined in the draft Law 6004. According to the draft Law 6004, the following stages of the procedure are proposed (see Figure 1):

1. Preliminary consideration of the application for granting (or updating) the integrated environmental permit: At this stage, based on the preliminary consideration of the application submitted by the operator, its content, and its completeness and conformity with the requirements on the form, the permitting authority informs the installation operator of the decision on the admissibility of the application or of the need to eliminate deficiencies and bring the application into compliance with the requirements of the Law;
2. Public consultations in the process of granting (or updating) the integrated environmental permit: At this stage public comments and suggestions on the installation and its operation are collected (by mail, e-mail, through the media, or during public hearings);
3. Consideration of the application for granting (or updating) the integrated environmental permit by the authorities concerned, other executive bodies, and local self-government bodies: At this stage, having considered the application submitted by the operator and comments and suggestions of the public, the authorities concerned provide to the permitting authority their conclusions on granting (or updating) the integrated environmental permit, as well as proposals on the conditions of the integrated environmental permit. Other executive bodies and local self-government bodies have the right to submit at this stage their comments and suggestions to the application. And in cases specified in the draft Law, the permitting

¹¹ The Parliament of Ukraine.

¹² Draft Law, ref. # 4167, September 29, 2020.

¹³ Draft Law, ref. # 6004, September 7, 2021.

¹⁴ Draft Law, ref. # 6004-1, September 7, 2021.

¹⁵ Draft Law, ref. # 6004-2, September 22, 2021.

¹⁶ Kobetska, 2018.

¹⁷ Explanatory Note to the Draft Law on Integrated Prevention and Control of Industrial Pollution, September 6, 2021. Explanatory note to the draft Law on Ensuring the Constitutional Rights of Citizens to a Safe Environment for Life and Health, September 21, 2021.

- authority drafts the integrated environmental permit, publishes it, and summons a conciliatory meeting;
4. Transboundary consultations: This stage of the procedure takes place only in cases provided for by international agreements of Ukraine, the binding nature of which has been approved by the Verkhovna Rada of Ukraine;
 5. Granting of the integrated environmental permit: This is the central stage of the procedure, when all collected documents including the application for granting (or updating) the integrated environmental permit, conclusions and proposals of the authorities concerned, comments and proposals of other executive authorities and local self-government bodies (if submitted), minutes of the conciliatory meeting (if summoned), and the results of public consultations and transboundary consultations (if held) are being considered. On the basis of such consideration the permitting authority then either grants the integrated environmental permit or decides to refuse to grant (or update) it;
 6. Informing of the granting of the integrated environmental permit: This is the final stage of the procedure, during which the permitting body informs the operator of the installation and the public of the decision, and publishes it.

3.2 Public participation

Public participation in the permitting procedure is an important cross-cutting element of the IED. In order to implement the relevant provisions of the IED and the Aarhus Convention¹⁸, to which Ukraine is a party, all currently registered draft Laws (6004, 6004-1, and 6004-2) provide for public participation in the permitting procedure. At the same time, only the draft Laws 6004 and 6004-2 ensure compliance with international standards. On the other hand, the draft Law 6004-1 in many of its provisions directly contradicts the provisions of the relevant EU acquis, including the Aarhus Convention in terms of public participation.

As argued by Prof. Jendroška¹⁹, to ensure compliance with the Aarhus Convention (Article 6.10) in terms of application of public participation provisions in case of reconsideration or update of the operating conditions for a specific activity the proposed draft laws prescribe for an identical procedure both for granting the IEP and for amending it, including for the respective public participation provisions therein.

According to international standards, the draft Laws 6004 and 6004-2 provide for the basic principles of public access to information related to granting (or updating) the IED and public participation in the process of its granting (or updating). The permitting body has a key role to play in providing timely opportunities for public participation.

The main elements of effective public participation in the decision-making process under the EU acquis, including the Aarhus Convention²⁰, which have already been transposed, in particular, into the Laws of Ukraine 'On Environmental Impact Assessment' and 'On Strategic Environmental Assessment' and are now proposed in the draft Laws transposing the IED, include notifying the public of the decision-making process, providing the public with access to information necessary for decision-making, collecting comments and suggestions from the public and considering them by the decision-making body, and informing the public of the decision.

The draft Laws also provide for the establishment of the Single State Electronic Information System of Integrated Environmental Permits (hereinafter – the electronic system), which is to ensure free public access via the Internet to a wide range of documents on installations operating on the basis of integrated environmental permits. The electronic system also provides notification of public participation opportunities and collects public comments and suggestions.

Thus, the model of the permitting procedure set out in the draft Laws 6004 and 6004-2 with integrated mechanisms of public participation, meets international standards in this area and the requirements of the IED.

4 Conclusion

The establishment of the legal framework in the field of industrial pollution, which will help maintain the competitiveness of Ukrainian industry in international markets, develop innovative technologies, protect the environment and public health, and consolidate efforts to harmonize with the European aspirations of "zero pollution" is feasible today. It is even more feasible in light of the physical destruction of many big polluters by the act of war and the green principles tied to any future reconstruction actions. Moreover, the modernization of the industry on the basis of BAT is inextricably linked to other existing environmental commitments for industry, in particular, the requirements of the National Emission Reduction Plan (NAP), National Defined Contribution (NDC-2), decarbonisation, investment commitments, the implementation of the European Green Deal, and the achievement of the Sustainable Development Goals.

¹⁸ Convention on Access to Information, Public Participation in the Process decision-making and access to justice in environmental matters, 25 June 1998.

¹⁹ Anapyanova and Jendroška, 2021.

²⁰ UNECE, 2014.

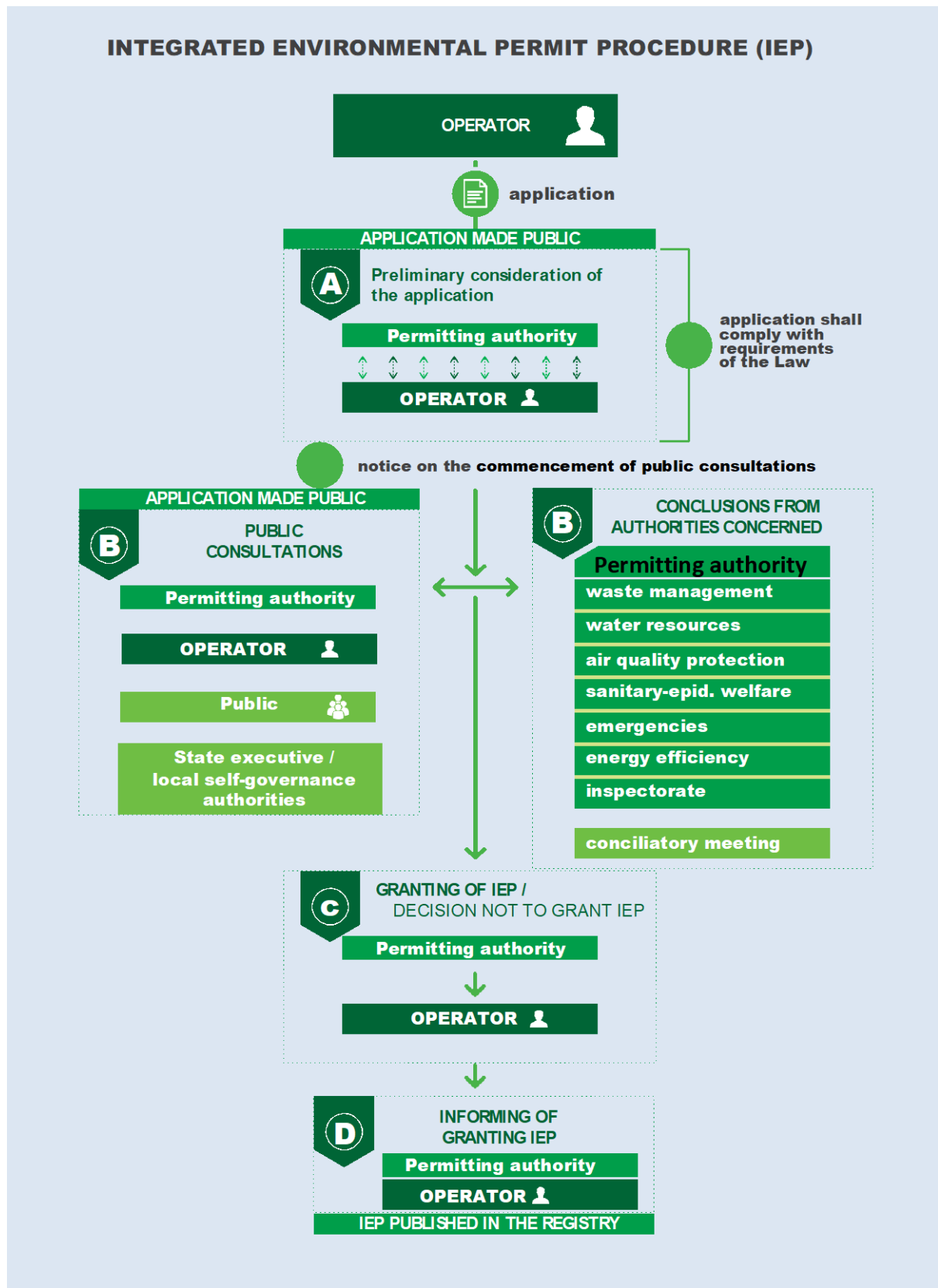


Figure 2: Integrated Environmental Permit Procedure (IEP), illustration by the authors

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In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstadt University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

elni Review

The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review (info@elni.org) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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