4 Instruments of Direct Behavioural Regulation

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I GENERAL

Direct behavioural regulation conclusively prescribes a particular type of behaviour (to act, to tolerate or to refrain). *Indirect behavioural regulation* approaches the government aim but by a roundabout route: it primarily influences the motivation of the addressee and leaves him or her a broad area of discretion. If, in the latter case, the state formulates a behavioural expectation at all, a behaviour which frustrates this expectation remains lawful (however unwanted and possibly made subject to such burdensome consequences as, for example, the payment of a charge). This is different from direct behavioural regulation, where the addressees' behaviour against the expectation is unlawful. The addressees only have the possibility to bow to the administrative demand or to give up the regulated activity completely. The performance of the direct behavioural demand can be different

from the indirect behavioural expectation, in principle induced by means of coercion and its non-performance punishable by sanctions.[1]

In contrast to the indirect form of regulation the direct behavioural regulation has, on one hand, the disadvantage of a certain inflexibility and abruptness but, on the other hand, the advantage of clarity under the rule of law. The flexible and soft indirect behavioural regulation clouds this clarity under the rule of law because it qualifies the border between legality and illegality by having in-between categories with less sharp outlines (of the unwanted but not forbidden or of the wanted but not advisable behaviour). Additionally, judicial review in the interest of the 'second' party (that is, the applicant, addressee and so forth.) or affected third parties is geared to the direct behavioural regulation (for example, the administrative act) whereas, in contrast, it only incompletely grasps the behavioural expectation of the indirect type of regulation.

Admittedly in the comparison between instruments of direct and indirect regulation there is no sharp edge of delimitation but an ideal typical difference. Numerous in-between forms exist: The indirect regulation can therefore have the effect of a clear-cut prohibition if the intensity is sufficient – as, for instance, when a pollution charge is enormous. Conversely, the instruments of the direct behavioural regulation usually precede an informal agreement process with the addressee.

Instruments of direct behavioural regulation include the following:

- supervision;
- prohibitions and rules;
- obligation to notify;
- permission requirement.

As a rule, these instruments are intended for the enforcement of laws which prescribe a certain standard of environment protection in general terms. For example, a law may require that damage to environmental goods is to be avoided and precautions against the coming into being of such damage are to be taken, as well as that environmentally dangerous activities are obliged to gain permission so that it can be examined whether they obey the requirements of the law. Between these general legal requirements and the specific conditions laid down in the individual permits, intermediate steps can be taken. This is possible by standardization of the requirements[2] or by planning. (See the explanation at the end of this chapter).

1 See on these and other differences Chapter 12 by P. Glasbergen, Chapter 13 by G. Bándi and Chapter 15 by E. Rehbinder in this volume.
2 See Chapter 8 on standard-setting by G. Winter in this volume.

II SUPERVISION

State supervision fulfils a double aim in environmental protection: First, it serves to control individual activities with regard both to whether they comply with the requirements of the environmental laws and the concrete terms of the permits or prohibition (compliance control). Second, it has the more comprehensive function of continuous environmental monitoring of the development of the environmental situation sector by sector. In this case it serves the planning preparation and individual administrative measures which can produce a further compliance control at a later stage. In this way a proper supervision cycle can form.

The individual competences of supervision include the authorities' right to enter premises and to inspect, the right to look at files and documents, rights to extract test samples, to take own measurements and make inspections as well as the authority to demand information and active support. Sometimes the supervisory authority is also entitled to enter works without prior announcement.

The regulation of the bearing of the costs for measuring and testing is of considerable significance for the authorities. One example is the German Federal Immission Control Act:[3] the plant operator bears the costs of the investigation into the emissions and immissions only when it emerges that he has violated the permit conditions or when the severity of ecological damage justifies additional conditions independent of those already existing.[4] As most authorities only have low budgets allocated to them for examinations, this regulation may hinder active supervision. At least in dangerous installations which necessitate a special emissions licence, the operator should, in any case, carry the examination costs, when there are grounds necessitating an examination and also when the grounds are not confirmed by the examination results.

Supervision can be implemented by the appointment of a state registered private supervisory organization as well as through self-supervision by the firm or by its participation in a semi-voluntary environmental audit.[5]

In the official practice of many countries it is observable that the supervisory activities are *cura posterior* and frequently lack a systematic approach with the setting of priorities and planning of the order of supervisory action.[6] The authorities generally only become active after complaints from neighbours and therefore only in cases in which the ecological damage is visible. As a rule the largest part of the workload is connected with the granting of permission for new installations

3 Bundesimmissionsschutzgesetz.
4 Art. 52, para. 4.
5 See Chapter 15 by E. Rehbinder in this volume.
6 See Chapter 10 by A. Capria in this volume.

and activities.[7] A reason for this is that in some countries – as in Germany – the operators' subjective right to permission is set against the authority's discretion in the observance of its supervisory authority. Accordingly the authority does not act illegally if it refrains from supervision; it does, however, if it does not grant a permission – provided that the legal conditions are fulfilled.

In order to escape this incongruity it has been suggested that supervision should be formulated as an obligation of the authority.[8] An additional possibility exists in giving third parties a right to intervention by the authorities against the cause of ecological damage. When the supervision is within the authority's discretion, this third-party right cannot nevertheless be directed at a specific measure but only at the judicial review of the use of the discretion. If the third party has, for example, made an application stating that the authority should take measures against an installation which exceeds the emissions limits and if the authority has refused to intervene because, according to its view, these limits have not been exceeded, the third party can institute proceedings and obtain a judgement. In this, the court orders the authority to decide anew upon the application in accordance with the court's factual and judicial observations. If it has emerged from the trial that the level of emissions has actually been exceeded, the authority must find and state other reasons if it still wishes to desist from intervention.[9]

III PROHIBITION AND RULES

Prohibitions and rules can be contained in a law which is directly effective upon the behaviour of the individual and need not be tailored to the concrete case by an administrative act, for example, a permit. There is, for instance, in the German nature conservation law, a prohibition on destroying especially valuable biotope.[10] This must be observed by force of the law. No concretizing prohibition or rule by an agency is necessary.

Laws very frequently contain rules or prohibitions to be drawn up by executive regulations. This is normal, for example, in the German Chemical Substances Law. Accordingly the limitation of the usage or marketing of dangerous chemicals will be expressed by regulation.[11]

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7 See Introduction in G. Winter (ed.) *German Environmental Law. Basic Texts and Introduction*, Dordrecht, 1994.

8 G. Lübbe-Wolff, Vollzugsprobleme der Umweltverwaltung, *Natur und Recht*, 1993, p. 217.

9 See German Administrative Court case BVerwGE 11; 95. For the legal position in England see Chapter 9 by A. Mumma in this volume.

10 See Art. 20c, Nature Conservation Law.

11 Cf. Art. 17, Chemical Substances Law.

Sanctions are mainly imposed if anyone violates the prohibitions or rules which have been laid down by laws or regulations. These consist of criminal prosecution only in serious cases. Many legal systems have special administrative sanctions in the form of a monetary fine. In addition there are official enforcement measures. In German law these consist of the authority first to order, by means of an administrative act, the deviant behaviour back into harmony with the legal rule or prohibition (basic order). To do this, the law must contain a special authorization for such an order, the simple prohibition or rule directed to the individual is not sufficient for this. If the special law does not contain such an authorization police law remains as a starting-point. The injury of a material prohibition or rule is valid as an injury to the public safety, endangerment of which authorizes official intervention under police power laws.

Where there is no special authorization provided, other legal systems instruct the authority to refer to normal legal court action which of course will delay the enforcement of the law itself.

If a basic order has been made and the operator is still not abiding by it, according to German law, three kinds of enforcement measure are available to the authority, namely:

- coercive fine (*Zwangsgeld*);
- substitute performance (*Ersatzvornahme*);[12]
- direct coercion (*unmittelbarer Zwang*).

The offender must be warned by the agency before these enforcement measures can actually be applied.

If the offender believes that he has not violated the legal prohibition or rule, he can appeal against the authorities' basic order. If he neglects to do this within a certain time period the order becomes final and absolute. There is also legal protection against the enforcement warning and measures but, at this stage, it can only be directed against the method of enforcement not against enforcement in general.

Alongside rules or prohibitions deriving directly from laws or regulations there are ones which are laid down by individual administrative acts. According to the principle of the rule of law, a legal authorization must be in existence for the enactment of such an administrative act. For example, according to the German Chemical Substances Law (Article 23) the competent regional authority can enact temporary measures to limit the marketing of a substance, if grounds for a considerable hazard are resultant and the normal method of enactment by the federal government (*Bundesregierung*) is too prolonged.

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12 In this case the authority appoints a third party to carry out the required activity and burdens the injurer with the costs of this measure.

Otherwise legal authorization for such rules or prohibition orders are frequently connected with permits. A permit allows a certain degree of ecological damage but prohibits going beyond the permitted limit.

IV THE OBLIGATION TO NOTIFY

The *obligation to notify* comes essentially in two variants: as an alternative to the requirement of permission (notification replacing a licence); or as a supervisory instrument be it in view of the compliance with the permit conditions, or of compliance with the direct legal rules and prohibitions (notification for supervision).

1 Notification replacing a licence (*Mitteilung als Ersatz für Erlaubnisvorbehalt*)

As an instrument to control the beginning of ecologically damaging activities the obligation to notify represents the mildest method. German environmental law provides an obligation to notify, for instance, in the Chemical Substances Law where a duty to notify the marketing of new dangerous substances is established. Through this type of notification the administration should obtain the information it needs in order to be able to intervene if necessary. The extent and intensity of the obligation to give information are governed very differently in individual laws, whereby the Chemical Substances Law, which is inspired by the relevant EC Directives, makes the highest demands in which it combines notification with demanding obligations on the applicant to examine and of proof. A far-reaching obligation of this type can (in the individual case) lead to effects whose intensity of intervention is comparable to a reservation of permission.

The notification replacing a licence is sometimes connected with a waiting period, within which the reported activity may not be carried out. The Chemical Substances Law is also an example here: the authority must be given the requested data to examine, six weeks from the time of notification, before the notified substance may be brought into circulation.

There are various reasons for introducing notification instead of requiring a permission. In the Chemical Substances Law the argument is that the reservation of permission would have led to considerable economic losses because the granting of permission takes so long. Whilst this delay represents is a burden on the economy, in the concept of the obligation to notify it is a burden on environmental protection. Nevertheless this is only tolerable when it can be assumed that the operator (as a rule) puts no ecologically damaging material on the market of his own accord.

2 Notification for supervision (*Mitteilung zur Überwachung*)

The rule in Article 27 of the German Immission Control Act may serve as an example of the obligation to notify for supervision:

> The operator of an installation subject to licensing shall be liable to provide the competent authority within a period to be fixed by such authority or on the date which has been fixed in the regulation issued pursuant to para. (4) below with information on the type and volume and spatial and temporal distribution of air pollution emitted from such installation within a specified period, including the conditions governing such emissions (emission declaration); he shall update the emission declaration at regular intervals of two years each.

V THE PERMISSION REQUIREMENT (*ERLAUBNISVORBEHALT*)

Permission requirements prohibit the commencement of certain activities (for example, the operation of an industrial installation) before official inspection and permission. The opposing concept is the fundamental permit with a prohibition reservation that only allows for an administrative monitoring with a possible prohibition.

1 The subject of permission

The subject of permission can be an installation or an activity. If it is an installation it is of significance whether the term 'installation' is narrowly or broadly defined. With a narrow definition a plant may need several licences because it may consist of several installations. For example, for a power station a licence could be necessary for the kiln, a further one for the machine room with turbine and a third for the cooling tower. A broad definition of the term has the advantage that the whole factory complex can be judged as an interrelated system. The benefit of viewing the complex as a whole will, however, be lost when with especially large installations the permit is granted in partial steps – the so-called partial licence (see below, section 4).

From another point of view an installation can have simultaneous effects on several environmental resources – for example, the air, water and soil. In this case several permits geared to the respective media are necessary. In a system of inte-

grated environmental licensing these various permits will be drawn together into one permit.[13]

The most important example of a permission requirement referring to an activity is connected to the usage of waters. Nevertheless, the environmentally most significant case being the discharge of sewage the relevant activity will often be connected to installations. The corresponding permit will therefore be granted, as a rule, in connection with the licence for the installation.

Licences referring to installations are principally formulated as *real concessions* – that is, they refer to the installation and not the applicant in person and their validity will therefore be unaffected by a change in individual operator. By contrast the person-related permit is not transferable because it is connected to such personal qualities as the reliability, capability and knowledge of the applicant. In environmental law combinations of both forms are frequent. The permit for constructing an atomic power station, according to German law[14] is geared to the safety of the installation on the one hand and the reliability of the applicant staff on the other.

When a type of installation or product is repeatedly constructed or marketed it is considered that its environmental safety, in so far as it is inherent in the installation or product, can be ascertained once and for all by a type of construction or model authorization. Permission for construction or distribution in the individual case can then be limited to individual questions of space and time. With an installation licence these are mainly locational problems. With larger, complex installations, however, each installation is still developed specifically because the location and, moreover, the continuous progress in technology so require. A *standard type permit* is not recommended for large installations. Apart from this it is also difficult to carry out a formal procedure with public participation for standard type licences because the public's usual first interest in a project lies in its realization at a particular location.

2 Supplementary regulations to a permission (*Nebenbestimmungen*)

Permits are frequently connected with supplementary regulations. In particular there exist impositions which prescribe certain behaviour or omissions for the operator (for example, compliance with an emissions limit), the fixing of the permit's expiry date and delaying or resolving conditions which make the taking effect or continued existence of the permission dependent on a defined event (for

13 The EU is preparing a directive which provides for these effects of integration. See below, section (e).

14 Art. 7, Nuclear Energy Law.

example, the availability of waste disposal for a nuclear power plant). A further supplementary regulation is the *reservation of revocation*.

Supplementary regulations are a flexible instrument for focusing the permission on the features of the individual case. Since they can potentially undo the whole grant of the permission as, for instance, in the case of an unlimited cancellation reservation, German law[15] limits the permissibility of supplementary regulations in certain ways. With administrative acts, supplementary regulations may only be enacted in order to secure the legal requirements of the grant of the permit. For administrative acts which are within the authority's discretion, the area of discretion is larger but is nevertheless limited by the fact that the supplementary regulations may not be contrary to the aim of the law regulating the permit.

In earlier German cases an operator could separately appeal against a burdensome imposition, leaving the permit itself untouched. The court had to repeal the imposition if it proved to be illegal. This applied even in those cases where the permit would probably not have been granted without the condition had the agency known that the condition was illegal. According to more recent case law the condition must be understood as part of the administrative act, so that a cancellation of the condition may only be considered when the permit would have been granted without the condition.[16]

3 Types of permission according to the scale of programming

The granting of permission can be programmed more or less strictly by law. How strictly the administration is bound by law is influenced by the national constitutional traditions, in particular on whether the parliament bases its control of the administration completely on the responsibility of the competent minister – in which case exact material instructions can be dispensed with – or whether the parliament considers these controls to be insufficient and therefore issues such material instructions. The legal programming is especially dense in those legal systems which focus on the protection of subjective rights and correspondingly establish a right to permission by the applicant. The variations become clear when one compares English, French and German formulation of the criteria for the grant of a licence for dangerous installations:

Section 6 of the British Environmental Protection Act 1990 provides:

15 Art. 26, para. 1, sentence 2 and para. 3, Administrative Procedure Law.

16 See H.-U. Erichsen in Erichsen, Martens (eds), *Allgemeines Verwaltungsrecht*, (9th edn), 1992, para. 15 II 3.

1. No person shall carry on a precribed process … except under an authorization granted by the enforcing authority and in accordance with the conditions to which it is subject.
2. An application shall not be granted unless the enforcing authority considers that the applicant will be able to carry on the process so as to comply with the conditions which would be included in the authorization.

In section 7, standards are formulated from which the conditions should be derived. These aims are very concretely formulated. For example, the prescribed standard is the *best available techniques not entailing excessive cost* (BATNEEC).

The legal technique is such that a negative barrier is erected for the authority – namely, permission is only granted under specific conditions. The authority is, however, not positively compelled to grant permission, and possesses the discretion to refuse this even when the named conditions are able to be fulfilled.

In French Law No. 76-663 of 19 July 1976 concerning classified installations Art. 3 states:

> Installations which present significant dangers or nuisances for the interests named in Art. 1 [i.e. the well-being of the neighbourhood, the health, the safety and hygiene of the public, the protection of nature and environment, the conservation of the landscape and of monuments] are subject to authorization by the prefect.
>
> The authorization can only be granted if these dangers or nuisances can be prevented by measures which are specified by prefectoral decision.

The law specifies no aims for such measures. From the legal-technical standpoint we are again concerned with a negative barrier: the conditions must prevent damage and nuisance, but the authority is not positively obliged to grant the permit. This differs from English law in that the conditions to be arranged are not rewritten precisely as regards to content.

In Article 4 of the German Federal Immission Control Act it is stated that dangerous installations require a special licence. Article 5 lays down so-called basic obligations which each operator must observe independently of the framework laid down in the permit. Hazard avoidance and precaution rules belong to these obligations. That means, as in Article 6, that:

> The licence is to be granted when (1) it is guaranteed that the obligations ensuing from Article 5 and regulations enacted by virtue of Article 7 are fulfilled, and ….

This demonstrates the two ways in which German legal technique differs from the English and French: First, the authority retains no discretion but is positively obliged to grant permission when the demands in Articles 5 can be fulfilled ('The licence *is to be* granted'). Second, the demands are not formulated as criteria for conditions to be attached to the licence but, as previously stated, as basic obligations which are primarily directed to the operator and which, by reference, become preconditions of the granting of a permission (which does not, in practice, exclude the fact that they are also framed as supplementary regulations (conditions or special terms), to the licence).

The technique of establishing a negative barrier with remaining official discretion is put into effect in German law in the water law for example. According to Article 6 of the Federal Water Act (*Wasserhaushaltsgesetz*) the authority must refuse permission when damage to water is expected, especially when it serves as drinking water. However, even if no damage is anticipated the authority is not obliged to grant permission since the permit may still be refused for reasons of water management – for example, in order to keep parts of the self-cleaning capacity of the water open for other uses.

In German law there is yet another type of permission in which the authorities' discretion is especially broad – namely, plan approval (*Planfeststellung*). This relates to larger infrastructure projects which affect a great many, different interests and are mostly connected with expropriation and destructive encroachments on nature – categories which include roads, airports, waterways, dams and railways. Here, the competent authority will essentially only balance the affected interests. Due to the possible consequences of expropriation it is furthermore necessary that the project is required in the public interest.[17] This prerequisite of public interest itself also simultaneously justifies possible encroachments on nature.

In most legal systems the granting of permission for projects requires that a formal procedure with public participation has been carried out and furthermore that the project has been the subject of an environmental impact assessment.[18]

4 Permission in steps

The licence for large and complex installations frequently follows partial steps. Through this it is possible to select decisive problems and deal with them in sections. A single licensing act is replaced by successive layered licensing processes.

The layering can be carried out in two ways: By advance licence (*Vorbescheid*) in which individual licence requirements are declared in advance to be given, such as the suitability of the installation's location or the overall conception of the

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18 See Chapter 7 by C. Lambrechts in this volume.

plant; or by partial licence (*Teilgenehmigung*) which permits the realization of an actual part of the installation or a distinguishable phase of the project.

The advance and the partial licence become more permanent if no legal action against them is taken, and are therefore binding. If, later, a further partial licence is granted which refers to another part of the installation, should a complaint be launched against this partial licence the legality of the earlier partial licence may not be examined. This kind of preclusion of objections should not to be confused with the preclusion of arguments which could be raised, but were not raised in time, by objection in a formal administrative procedure.

The possibility of advance and partial licences is problematic in that parts could be granted with no consideration for the whole project. The realization of a part could also prejudice follow-up decisions, thus hindering the free consideration of subsequent applications for partial licences. In German law, in order to limit this danger a requirement in the granting of advance and partial licences a so-called preliminary overall assessment (*vorläufiges Gesamturteil*) of the project is demanded.[19] This examines whether 'a temporary assessment results in there not being, from the start, any insurmountable obstacles in the way of erection and operation of the whole installation, in view of the licensing requirements'.[20]

For its part, this preliminary overall assessment exhibits a certain binding effect. In the test of subsequent partial licence, the authority must keep to that which has been tested at the preliminary overall assessment. Only if the specific circumstances or the legal regulation has changed since then is the overall assessment not binding. If the authority, for example, has accepted previously that the installation is technically so equipped that scarcely any emissions are to be expected, but closer examination of the installation technology at a later date has shown that emissions will in fact be considerable, the authority is not bound, for example, to grant the subsequent partial licence for the kiln from which the emissions escape.

The inner tension characterizing all these partial decisions lies in the conflict between interests of continuity (primarily of the applicant) and interests of flexibility (primarily of the licensing authority). On the one hand the applicant should receive relative security for his planning and investment; on the other hand the licensing authority cannot completely commit itself at the time of the partial decision because the details of the project's realization are still by no means definite. Nevertheless, the authority can be asked for a certain loyalty and consistency of direction in the enactment of any further decisions developing out of the relevant partial decisions. Large-scale changes of direction (without the removal of the earlier decisions – whose withdrawal remains possible, but is nevertheless bound to the general conditions of the withdrawal of administrative acts) in the later decisions are permissible only on the grounds of such circumstances arising, which at the time of the partial decision were not yet sufficiently recognizable or had not yet been tested by the authority.

[19] See, for example, paras 8 and 9, Immission Control Act.
[20] Art. 8, para. 1, No. 3, Immission Control Act.

Incidentally, it is frequently difficult for concerned third parties to retain an overview and to know which part of the installation and which licensing conditions have been covered by which partial or advance decision. This is particularly the case when, as is not infrequent, a number of step-by-step decisions are enacted, which might, in the course of the licensing proceedings, even be retrospectively modified or altered. In this situation a third party might appeal against one of the later partial licences but may be turned down on the ground that the specific controversial point had already been decided by an earlier partial licence which, having not been challenged within the appeal period, had already become final.

Furthermore, according to some environmental laws, the applicant can, under certain circumstances, begin to realize the project even before the granting of the licence (the so-called authorization of a *premature beginning*). This possibility clearly serves the interest of the applicant in accelerating the procedure but has the great disadvantage that factual pressures are created by the realization of the project, which means that, even if the plan proves to be illegal, the courts can *de facto* prevent the permission which has been granted from being quashed. On authorization of the premature beginning therefore, certain preconditions are set. According to Article 15a of the German Immission Control Act these preconditions comprise the following:

1. the final decision is expected to be in favour of the person(s) responsible for the project,
2. there exists a legitimate public interest in the earlier establishment including the trial operation of such installation because of the anticipated enhancement of environmental protection,
3. the person(s) responsible for the project undertake(s) to indemnify any damages suffered in connection with the establishment including the trial operation of such installation pending final decision and to restore the status quo ante in case of rejection of the project.

According to Article 15a, para. 2, the authorization can be revoked at any time and be subject to a reservation that subsequent conditions are imposed. Furthermore, according to section 3, the authority can demand the lodging of a security.

5 Effects of the permission

Primarily a licence permits the undertaking of a defined activity (the building of an installation, the marketing of a product, and so on). In addition, it gives a judicial structure. This means that the legal relationship between the developer and

others (particularly third parties), which is only roughly outlined by the underlying law, is put in concrete terms for the individual case. This implies, for example, that the third parties are compelled to tolerate the project. This particularly applies to those laws and duties which are derived from public laws. In addition, however, a licence can develop private law effects. In this case existing private law protection claims of third parties are excluded from further court action through the licence (the so-called *preclusion of claims* under private law – *Präklusionswirkung*).[21] Through this, third parties are compelled to proceed against the licence if they do not wish to lose their private-law rights.

Such a preclusion of claims under private law can only then be provided for if the licence is granted in formal proceedings, so that the third party bears witness to the proceedings and enables them to assert their objections.

A third effect of the licence is the so-called *integration effect* (*Konzentrationswirkung*). As complex proceedings frequently require several licences – for example, separate licences complying with the Immission Control law, Water law, Waste law, Construction law, Epidemic law and so on – the various licences are sometimes combined into one in the interests of simplifying the proceedings. At the granting of the integrating licence, however, the responsible authority must observe each of those requirements set by the individual special law.

In German law the plan approval has the most extensive integration effect within it.[22] The licence for dangerous installations has a partial integration effect[23] and includes, for example, the licence under Construction law and under Waste law, but not that under Water law, reflecting the special position of public waters which traditionally demand care from separate authorities.

One problem with extending integration is that the weight of the authorities who are responsible for individual media is reduced. Although cross-section examination when making a plan is desirable insofar as the displacement of the ecological damage from one medium to another is avoided and an optimum solution can be sought, it does so at the expense of the in-depth examination with regard to the individual media. The factory inspectorate, for example, is presumably not in a position to see and to coordinate completely all future burdens on a stretch of water. A solution to this dilemma may lie in making the granting of the integrated licence subject to the agreement of the authorities in charge of the most important media (water authority, nature conservation authority, waste authority).

A further problem of the integration effect arises in the supervisory framework after the realization of the project. Although the respective specialist authorities are certainly responsible for this supervision at any one time, they are hindered

21 An example in Art. 14, Immission Control Act.
22 See Art. 75, Administrative Procedure Law.
23 Art. 13, Immission Control Act.

from making a quick reaction, however, by the fact that they themselves may not take measures which contradict the integration effect of the licence. They can only suggest to the officials responsible for the integrated licence that they alter the licence or that they equip it with additional orders.

6 Subsequent changes to the permission

The granting of licences is counterpointed by the possibilities of subsequent change to licences, which are particularly highly developed in environmental law since they secure flexibility. There is a difference between the revocation of the licence on the one hand and additional orders on the other.

The revocation is the more traditional instrument. In German law a difference is made between the withdrawal of a licence which has been illegal from the outset, and the revocation of a legitimate licence. This differentiation is provided by the general administrative procedure law,[24] and is taken up and, in certain ways, refined in the environmental law. Put crudely, the withdrawal is more easily possible since, because of the illegality, the beneficiary of a licence is only granted a small protection of legitimate expectations, while the revocation presupposes that the situation or legal position has changed and that the person concerned be paid compensation, in so far as his confidence is worthy of protection.

In practice, the revocation of licences is rare – not least because of the duty of compensation. Additional orders are the common instrument of adjusting an installation to the new recognition of risks, new factual circumstances and new legal positions. This instrument is provided for in a multitude of laws and is most precisely illustrated in Article 17 of the German Federal Immission Control Act.

The additional order shows a type of legal reservation which differs from the conventional reservation in that it must not be included in the licence as a supplementary requirement, but is valid in every case.

The additional order stands in a tense relationship with the protection of vested rights and of legitimate expectations. The protection of vested rights is particularly restricted by the fact that additional orders are usually not connected with compensation. To a large extent, laws such as the said Article 17 does not even have to demand that the ordered measure is economically viable for the individual firm. It merely demands that the measure is proportionate; in other words, that a less costly measure is not discernible and that the ordered measure is also not out of proportion to the additional environmental protection which can be achieved.

24 Cf. Art. 48 and 49, Administrative Procedure Law.

Additional orders are – at least theoretically – an appropriate opportunity for so-called offset agreements. Although such informal agreements, because they are concluded in the shadow of the formal law, tend to evade legal control there is a regulation in Article 17, para. 3a of the German Immission Control Act. This regulation runs as follows:

> The competent authority shall refrain from giving any such subsequent orders to the extent a plan submitted by the operator provides for technical measures to be taken at such operator's or any other parties' plants resulting in a reduction of emission levels which is significantly higher than the aggregate of reductions which might be attained by issuing such subsequent orders for the performance of the obligations ensuing from this Act or from any regulations issued hereunder, thus promoting achievement of the purpose referred to in the Article 1 hereof. This shall not apply to the exent the operator has already undertaken to reduce emissions by the issue of a subsequent order under para. (1) above or by the imposition of an obligation under Article 12, para. (1) hereof or to the extent such subsequent order is to be issued pursuant to para. (2), second sentence, above. Compensation shall only be permitted among substances of the same type or substances having a comparable effect on the environment.

In German administrative practice, this option is rarely used.[25]

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25 For the problem of offset agreements see Chapter 15 by E. Rehbinder in this volume.