

Industrial Emissions Directive: (Non)-substantial permit change

1. 4. 2021, Brno, Czech Republic

This analysis was prepared by the Frank Bold Society as background material for the purposes of the ongoing revision of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control, hereinafter “IED”). An analysis of implementation practice in the Czech Republic and Poland has been carried out to demonstrate the issues faced by the public when trying to participate in most of the permitting procedures.

According to the IED, every change of installation which “may have significant negative effects on human health or the environment” should be considered a “substantial change” and therefore be permitted only with proper public participation. However, the analysis of Czech and Polish implementation practice shows that most changes are permitted as “non-substantial changes”, without public participation.

First, the analysis offers an overview of the relevant provisions of the IED, followed by **several case studies from the Czech Republic and Poland**, including statistical evidence of the Czech permitting procedures. The analysis shows that in several cases, the public has been illegally denied their right to participate in the permitting procedures. The analysis also shows that in the Czech Republic, 91 % of permit changes exclude public participation as “non-substantial” changes. Moreover, the administrative appeal and court proceedings take a long time and place a disproportionate burden on the public concerned to go through each illegal “non-substantial” permit change.

The **main conclusion** of the analysis is that the vague definition of “substantial change” is **one of the main obstacles** to proper public participation in the Member States in question. The **main recommendation** in this area for the IED review is that instead of a demonstrative definition of a “substantial change”, there should be an exhaustive, taxative list of situations which can be considered “non-substantial changes”, while any other changes **should be considered “substantial” by default**.

1. Relevant provisions of the IED

According to Art. 3(9) of the IED: *“substantial change” means a change in the nature or functioning, or an extension, of an installation or combustion plant, waste incineration plant or waste co-incineration plant which **may have significant negative effects on human health or the environment.**”* (emphasis added) This demonstrative definition is supplemented with additional examples of substantial changes in Art 20(3), Art. 54 and Art 63 of the IED, which further specify individual situations which shall always be considered “substantial change” of installation (e.g. extensions of installations which in themselves reach the capacity thresholds in Annex I. of the IED). The **main issue of interpretation**

is, however, which changes of installations **may or may not have significant negative effects** on human health or the environment.

On the basis of Article 24(1) of the IED, the public concerned should be **given early and effective opportunities to participate** in all procedures where a permit is granted for any substantial change. Conversely, participation of the public concerned does not have to be ensured when non-substantial changes are permitted. Therefore, the assessment of what is considered (non-)substantial change is crucial for the public's participation rights.

2. Case studies

a) Statistics on integrated permitting in the Czech Republic

In the Czech Republic, according to the official IPPC database¹ there have been 12 407 permit changes since 2004. Only 1 120 of them (9 %) were adopted as "substantial" changes. That means that the public concerned has only been **able to participate in 9 % of the permitting procedures**. In the other 91 % of permitting procedures, the public concerned only learned about the permit changes after the decisions were made and were published. The public was not able to challenge these decisions on material grounds and could only claim the breach of procedural rules. Table 1 below offers an overview of substantial and non-substantial changes adopted by individual regional authorities, showing further statistical differences between these.

Regional authority	Substantial (% of total)	Non-substantial	Total permit changes
<i>Praha (capital)</i>	13 (3,8 %)	327	340
<i>Jihočeský Region</i>	51 (5,5 %)	880	931
<i>Jihomoravský Region</i>	56 (5,4 %)	982	1038
<i>Karlovarský Region</i>	12 (7,7 %)	144	156
<i>Vysočina Region</i>	40 (6,3 %)	590	630
<i>Královéhradecký Region</i>	106 (19,1 %)	448	554
<i>Liberecký Region</i>	60 (11,5 %)	461	521
<i>Moravskoslezský Region</i>	87 (3,7 %)	2235	2322
<i>Olomoucký Region</i>	56 (9,4 %)	540	596

¹ See: <https://www.mzp.cz/ippc/ippc4.nsf/search.xsp>, data taken as of 11. 3. 2021.

<i>Pardubický Region</i>	39 (4,8 %)	772	811
<i>Plzeňský Region</i>	32 (5,9 %)	515	547
<i>Středočeský Region</i>	450 (25,9 %)	1 290	1740
<i>Ústecký Region</i>	69 (4,1 %)	1 594	1663
<i>Zlínský region</i>	49 (8,8 %)	509	558
Total	1 120 (9 %)	11 287	12 407

Table 1: Overview of substantial and non-substantial changes by region

We are aware that these statistics do not constitute direct evidence that the “non-substantial” regime is being overused by Czech authorities. However, we are convinced that the data are very illustrative of the general approach of the Czech authorities and that together with the case studies below they lead to the conclusion that **public participation rights under Art. 24(1) of the IED are not being implemented correctly** in the Czech Republic, with the non-substantial change permitting regime being one of the main obstacles.

b) Rybnik power plant in Poland

In general, administrative authorities in Poland interpret the concept of a “substantial change” in an installation extremely narrowly, thus significantly limiting the participation of the public concerned in most permit amendment proceedings.

In the case of Elektrownia Rybnik (LCP, coal power plant), an amendment to the permit related to the start-up of the wet desulphurization installation and installation of selective non-catalytic denitrification of flue gases was **initially qualified by the operator and the authority as a substantial change** in the installation. An environmental non-governmental organization was involved in the proceedings, leading to the **annulment of the decision** of the first instance administrative authority. Immediately after the said event, the investor **withdrew the application, reclassifying the application for an identical change as a non-substantial permit change**, which was approved by the responsible authority. NGOs and the public concerned therefore could not participate in this new procedure, though the subject remained the same.

This event shows that the **qualification of the proceedings** as concerning a non-substantial change of permit is often conducted **arbitrarily and without any legal justification**, resulting in the public’s participation rights being restricted.

c) TNP derogation in the Czech Republic and Poland

The majority of coal and lignite power plants in the Czech Republic and Poland benefited from the Transitional National Plan (hereinafter “**TNP**”) derogation under Art. 32 of the IED. At the end of 2015, many integrated permits were being adjusted due to the participation of installations in this derogation. However, in numerous cases, public participation was not ensured in the proceedings introducing this derogation, as they were considered to be non-substantial permit changes.

In the Czech Republic, a **total of 63 large combustion plants** enrolled in the TNP regime in 2016. All related operating conditions such as emission limits and emission ceilings were translated into individual permits in the regime of a **non-substantial change**. Therefore, the public concerned was not able to participate in these proceedings or debate the environmental impacts of these operating conditions. In 4 cases concerning installations located in polluted areas where EQS for the air quality have been breached, Frank Bold Society challenged these permits before administrative courts of first instance, in all cases unsuccessfully.

In one case (installation Závod 4 – Energetika, operator TAMEH Czech, s.r.o.) Frank Bold Society continued and filed a cassation complaint to the Supreme Administrative Court. **In November 2020, the Supreme Administrative Court ruled that the responsible authority did not sufficiently explain why the change was considered non-substantial.** Also, the court stated that the evidence submitted by Frank Bold Society would suggest that the installation is located in a very heavily polluted region of the City of Ostrava and, therefore, the relaxation of emission limits in this area should have been properly considered. Ironically, this ground-breaking judgment of the Supreme Administrative Court was delivered only after the TNP regime ended. Therefore, the installation in question actually operated for the **whole four years of the TNP based on an illegal permit**. Also, the reasoning of the Supreme Administrative Court could be **analogically applied to other permits** which were not challenged before this court.

Similarly, in Poland, TNP-related permit changes for Rybnik, Konin and Pątnów power plants were **also enacted as non-substantial changes**. Moreover, Rybnik power plant is located in the Rybnik area, which is **heavily polluted with dust**, and through TNP the power plant was enabled to derogate from emission limits for dust and SO₂. The proceedings, which introduced the relaxation of emission limits resulting from participation in the TNP, were not accompanied by the possibility of public participation or a public consultation. The information about the granting of permit changes was **published only after the decision had been made**, without any details on the contents or reasoning of the decision.

These examples show that the absolute predominance of non-substantial changes in the Czech Republic is a significant obstacle to public participation rights. A similar pattern also seems to prevail in Poland, although not as much information is publicly available. Even when the public concerned are able to exercise their participation rights before courts, these **procedures take years**. Only after these years of disputes over participation rights can the public concerned finally argue on the matters of the proceedings, however, in some cases it might be too late.

d) Emissions of mercury into water in the Czech Republic

In four recent cases in the Czech Republic, the lignite power plants Chvaletice, Počerady, Ledvice and Tušimice were either **allowed to emit increased ELVs of mercury into water**, or ELVs for mercury were **introduced into their permits for the first time**. In all these cases, the emission limits for mercury were permitted in the regime of a **non-substantial change** – without proper public participation. As in the cases described above, the information about the decision was published only after the decision had already been made and entered into force.

Frank Bold Society **challenged all these permits**, arguing that both the increase and first-time regulation of mercury emissions into water should have been permitted via the regime of substantial changes. In one case, Frank Bold Society was successful, and the Ministry of Environment quashed the first instance decision and ordered the permit change to be adopted via the regime of substantial change. The renewed proceedings are currently still pending. The other three administrative appeals are still pending before the Ministry of Environment.

Even though in the first case Frank Bold Society was able to achieve its participation rights via administrative appeal, this procedure required thorough knowledge of the legal system and regular (weekly) monitoring of the IPPC database. The proceedings **took several months**,² with the challenged decision being in force in the meantime. The **administrative practice** of the regional authorities **did not change after the first case**, where the Ministry of Environment granted Frank Bold Society its participation rights. Even though the legal issue had already been answered by the authority of appeal, the regional authorities in the following three cases kept proceeding in an illegal manner, restricting the rights of the public concerned. In our opinion it is unacceptable that the public concerned should have to ensure participation rights via administrative appeals in each individual case. Therefore, we suggest that **systemic changes need to be adopted in the definition of substantial change according to the IED**.

3. Conclusions

The case studies show that the public concerned has very little opportunity to participate in IED permitting procedures in the Czech Republic and in Poland. The main reason seems to be the excessive use of the “non-substantial” installation change permitting regime by the national authorities (e.g. in 91 % cases in the Czech Republic). The public only learns about a non-substantial change after the decision has already been made and has entered into force. To achieve its participation rights, the public concerned has to challenge the decision on procedural grounds, which takes from several months to years, before the public can participate in the proceedings and argue on the matters of the case.

As a solution to this problem, Frank Bold Society proposes, that **instead of a demonstrative definition of a “substantial change”, there should be an exhaustive taxative list of situations**

² E.g. in the case of Chvaletice lignite power plant, the permit change in question was issued on June 28th 2019, the permit was quashed by the administrative authority of appeal on October 7th 2019. However, the renewed proceedings in the first instance has been suspended several times, so that the operator could submit the relevant information, and has not been finished up to date.

which can be considered “non-substantial changes”, while any other changes should be considered “substantial” by default.

Frank Bold Society, z.s.
Mgr. Laura Otýpková, Ph.D.
laura.otypkova@frankbold.org
Tel.: +420 770 170 722

Note: Research has been carried out by Frank Bold Society (the Czech Republic) and Fundacja Frank Bold (Poland). All the reference documents are available upon request.