Safety responsibility in establishments subject to the major accidents legislation in industrial parks
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Development of criteria for meeting safety responsibility in establishments subject to major accidents legislation in industrial parks UFOPLAN project no. 299 48 32
Summary of the results
1. Legal foundations (Prof. Dr. Spindler, University of Göttingen/Prof. Dr. Peter, University of Applied Sciences, Wildau)

Industrial parks raise new fundamental legal questions with regard to allocating operator responsibility for installations. Whereas in the past a site could essentially be allocated to one operator ("works"), there is now a growing trend towards separating property ownership, infrastructures and operation of the actual production plants and warehouses in different companies or other legal entities (operators). Even production plants which technically speaking form a single unit may be divided up into different legal entities. From a legal point of view this gives rise to the need to review in the light of new developments the licensing and supervision (enforcement) situation, which on the one hand relate to hazardous situations, but on the other refer to one legal entity as operator. In particular the new law on major accidents (*previously also referred to as hazardous incidents*), which is based on the addition of substance quantities in establishments and requires the operator to set up a safety management system, raises the issue of how to deal with sites which are characterised by a quantity of substances arising from various operators and by a separation of the infrastructure and production facilities. To this end, clarification was needed both of the 12th Federal Immission Control Ordinance (Major Accidents Ordinance[1]) and of the connections between corporate/company law, private law and the company law of groups:

The results can essentially be summarised as follows:

Under the 12th Federal Immission Control Ordinance and Article 3, 5a of the Federal Immission Control Act, in terms of hazard the establishment must primarily be defined according to the mutual proximity of installations. Adding up substance quantities can only be justified if installations are in such proximity to each other that a synergistic reaction could occur in the case of a major accident (safety distance or domino effect). However, the danger correlation can also be produced through infrastructure systems, in particular pipeline networks. The latter case also involves a time component, which is determined according to the reaction time within which an accident in one installation could impact on another installation connected by the pipeline. Nevertheless, with regard to the hazard potential, the synergy effects must always be related to substances; other infrastructure systems (joint IT etc) cannot justify adding up substance quantities.

Another fundamental characteristic of the establishment is uniform supervision by one operator. As a matter of principle, therefore, installations which are run by different operators

[1] Störfallverordnung – referred to in former translations as 'Hazardous Incidents Ordinance'; 'Major Accidents Ordinance' now used in line with EU terminology (Seveso II Directive)

cannot be added together with regard to substance quantities. Exceptions based on principles of private law and the company law of groups only arise if an operating enterprise[2] is controlled by another enterprise to such a great extent that it is justifiable to allocate the activity to the controlling enterprise. Simply holding a majority of shares in an operating enterprise or having a contract for the lease is not sufficient for this.

Due to this required supervision by one operator, in most industrial park structures the individual legal entities which operate each installation must be recognised as independent operators. This can lead, however, to previously integrated hazard potentials being split up by a company and/or private law structure and thus excluded from the area of application of major accidents legislation or the Seveso II Directive. Even installations or parts of installations in close mutual proximity which in the past were controlled by one operator in one location and could qualify as installations under the major accident legislation, can now, by being allocated to different legal entities, be subject merely to the general obligations under immissions control law pursuant to Article 5 of the Federal Immission Control Act. Nor can this be remedied by the provisions governing the domino effect of Articles 15 and 6 of the 12th Federal Immission Control Ordinance since these assume that the neighbouring plants each individually fall under the 12th Federal Immission Control Ordinance. A possibility is to issue orders via Article 17 of the Federal Immission Control Act or in the framework of licensing conditions which take due account of the hazard potential; these orders however can by no means achieve the level of the obligations pursuant to the 12th Federal Immission Control Ordinance, since otherwise the legally specified distinction between general and special obligations in immissions control legislation would be undermined. This state of affairs could be changed somewhat merely with appropriate allocation, which would have to be introduced by the legislator or regulatory body – European law would not hinder the legislator from tightening the laws in such a way.

On the other hand, if there is no allocation, the different operators must as a matter of principle be classified as neighbours or third parties as defined by various standards under public law. The scope of the interpretation only allows very narrow and limited possibilities for taking the joint use of infrastructure facilities into account, for instance joint waste management facilities or on-site transport systems.

Infrastructure facilities which are used by several operators must be allocated to a legal entity. This entity is the one with technical control and decision-making powers regarding the safety and the operation of the infrastructure facility, especially in the case of pipeline networks. The operator of the infrastructure facilities is not however subject to the 12th Federal Immission Control Ordinance solely because of the connection between installations subject to major accident legislation, but only if he himself meets the criteria pursuant to the 12th Federal Immission Control Ordinance. Orders which relate to the infrastructure can therefore as a matter of principle only be issued to the operators, not to the infrastructure enterprise. Irrespective of this, under private and criminal law the operators of infrastructure facilities are obligated to ensure the maintenance of safety and security in the industrial park

[2] The meaning of enterprise in this context is: company or other legal entity.

and coordination between the operators. At least on the basis of the Federal Immissions Control Act, however, this is not enforceable under public law.

The possibilities for the authorities to issue orders in the framework of the necessary cooperation of so-called domino establishments are extremely limited and especially entail a considerable lack of clarity with regard to establishing what information is required. The authority can only demand cooperation with a particular infrastructure enterprise if the use of these services is the only means by which the obligations under the 12th Federal Immission Control Ordinance can be met. In practice, often only coordinated procedures of infrastructure enterprise, operator and authority are possible here.

Unlike in cartel legislation for example, in the absence of an appropriate enabling basis, there is no possibility under public law to issue orders against the division of an operator. The general enabling bases under immission control or police law only relate to the potential dangers or to precautionary action; neither are affected by a purely legal process. In contrast, there are more extensive possibilities to issue orders when delegating immission control law obligations to a third party: while as a matter of principle the operator bears responsibility as to who he uses to fulfil his obligations; the operator alone is subject to immission control law. If however, it is apparent that an unreliable third party will be used to meet the obligations the authority can issue an appropriate order. The same applies with regard to a licence or corresponding conditions.

2. Meeting safety responsibility (T. Friedenstab/Prof. Dr. Jochum, Gerling Risiko Consulting GmbH)

Linked to the allocation of safety responsibility is the question of how this responsibility must be fulfilled in the industrial park. To this end, 4 industrial parks (chemical parks) of varying size, structure and history were analysed, located in the old and new federal states (“Länder”).

To clarify this matter the essential characteristics of industrial parks must first be considered with regard to the actual on-site circumstances as well as at a legal and organisational level. It is helpful here to compare the “works” (single user site)on the one hand with operational sites in the industrial district on the other. The industrial park's on-site circumstances and particularly the overall hazard potential broadly correspond to that of a works, while at the legal level the fact that there are numerous operators is comparable to an industrial district. With regard to organisation, the differing types of organisational 'constitutions' in the respective park make it more similar either to a works or to an industrial district. In summary, the essential characteristics of the industrial park are numerous operators whose operational sites are in close proximity to each other and have a joint private infrastructure which is operated by one or several central service enterprises.

The extent to which special conditions apply to each operator for fulfilling safety responsibility in the industrial park nevertheless depends on the specific nature of the

industrial park and the situation of the operator. A crucial criterion for this – as also in the formation of an establishment – is the overall hazard.

The Ordinance takes into consideration the overall hazard of the total area under the prerequisites of Article 15, which - after this overall hazard has been formally established – then leads to the legal consequences of Article 6 para. 3. Only very limited information and /or cooperation obligations arise as a direct legal consequence of this. However, above all the information obligations pursuant to No. 1 are simply 'obligations to assist' which aim to ensure that an implicit main obligation of an establishment operator as defined in Article 15 can be complied with: beyond his own establishment he must take account of the overall hazard, and he must do this in his safety policy, his safety management system, safety report and in the internal emergency planning.

This obligation is by no means always or only applicable in 'industrial parks', but is based on the specific situation of the establishment. In the industrial park, however, special requirements frequently arise from the often (if not in all cases) close proximity of the establishments and their interconnectedness. As a matter of principle the operator can decide for himself how to fulfil these requirements. Only in exceptional cases is it likely that his options are 'reduced to zero' because only one specific measure is suitable and therefore necessary and consequently can be specifically required by an authority.

The overall hazard is to be taken into consideration initially in the context of the safety policy and safety management system required under Article 8. The Ordinance requires a policy for each establishment and a system in each case, although it does not require any joint management of the establishment. Also, an operator can make similar regulations for several establishments which must then be further developed specifically for each establishment. The operators are also not prevented from creating multi-operator regulations which exceed their obligation to coordinate individual policies and systems. A joint safety policy can be understood as being advanced coordination of the policies of all operators involved in the overall hazard. Setting up joint advisory or even decision-making panels and/or creating joint regulations on safety processes especially ensures the coordination of the safety management systems. Depending on the nature of the overall hazard such measures are particularly to be recommended; they are only the subject of an order if there is no other alternative to this.

The coordination obligation under public law is therefore very similar to the coordination of operators in industrial parks which has often been undertaken in the past on the basis of private law and which is now also being promoted under public law – at least under the conditions prescribed in major accident legislation – and thus being additionally secured.

Article 6 para. 3, on the other hand, stipulates that the establishment-related alarm and emergency plans must at least reflect the overall hazard ascertained according to the provision in Article 15. To this end, it is advisable to issue another internal regulation for the whole of the industrial park. While this too is not required by law, it is favourable in terms of efficiency and ultimately represents a further development of the "works alarm and

emergency plan" recommended by the 3rd general administrative provision on major accidents.

Emergency management planning must be distinguished from emergency management structure, which is extensively left up to the operator. Only an establishment-wide management of emergency measures, that is a central emergency organisation for the establishment, is required rather than a central management of inter-establishment measures. Also domino operators are not obligated to be subject to one management in the industrial park in the case of a major accident, even if this is undoubtedly practical from a technical point of view.

In the case of a 'joint' authorisation from the enterprises on the site, the central service enterprise (also called the 'infrastructure enterprise') can assume an important coordinating function without entering an expanded responsibility under public law. Its particular advantage lies in its coordination potential, which enables it to replace the integrating function which is lost due to the lack of a works operator.

The prerequisite for this is the relevant authorisation, but this cannot be forced under public law. In a practical light, such an authorisation makes all the more sense the greater the overall hazard and consequently the coordination obligations of individual operators. The increasing 'density' of these obligations would make solutions covering the entire industrial park more efficient, and thus it is all the more appropriate to give joint authorisation to the service enterprise.
Central coordinating and supporting functions should be assigned to the service enterprise in the case of a major accident; this also implies there is one 'works fire service'. However, the relevant fire protection laws for the parks studied complicate or even hinder the maintenance of a works fire service for the entire industrial park.

Thus the 'hidden primary obligation' to consider the overall hazard leads (in this respect) to the industrial park resembling the earlier works. The resulting (relative) unity is no longer owing to the works operator but to the coordination of the operators in the industrial park.

3. Summary

The study has shown that both Directive and the Ordinance offer suitable solutions for taking the situation in industrial parks into due account. While it is no longer possible for either of these instruments to achieve their aim of a consideration of the overall hazard in an industrial park by the 'direct route' of one operator (works operator) with total responsibility, they do offer adequate instruments to solve this problem, without jeopardizing the existence and in particular the market-oriented further development of the industrial park.

In particular the special consideration of the 'domino effect' opens up the possibility to develop special requirements for the major accident prevention of individual operators in the industrial park. The Ordinance, however, can only prescribe what is 'necessary' to each operator for the purpose of meeting its aims. The organisational scope thus provided cannot

be limited under public law even in the sense of a 'best practice solution'. In individual cases specific requirements can indeed be derived from the respective conditions in the industrial park. The greater the potential interactions in the case of a major accident, the more likely it is that the authority can order a closer cooperation.
Voluntary instruments developed on the basis of private law for considering the overall hazard also fulfil the often parallel public law obligation. While other organisational possibilities do remain, the solutions developed in the parks studies can often be seen as a model. The more intensive the voluntary or 'called for' cooperation between the operators, the more appropriate it is to involve a service enterprise. This enterprise can to some extent act as a substitute for the integrating function which was formerly met by the (sole) works operator. All in all, close incorporation of a service enterprise into the industrial park leads to a 'relative unity', which is due less to the legal obligation to coordinate than to the recognition that such coordination is necessary.

In accordance with its mandate, the study was confined to investigating the transposition of the SEVESO II Directive. It became very apparent however that a number of other legal and organisational questions arise with regard to industrial parks which cannot be dealt with here. While the study was able to address some basic issues which could assist in solving other issues, industrial parks nevertheless largely continue to pose a legal and organisational problem.