

- Translation -

**Statement by the Environmental Verification Committee (UGA)
on the evaluation of legal compliance by
EMAS participants with regard to legal provisions for supervisions
(Resolution from 31st plenary meeting held on 3rd February 2004)**

In a letter, dated 17th March 2003, the Federal Ministry for Environment, Nature Protection and Reactor Safety (MoE), Dep. G I 2, asked the Environmental Verification Committee (UGA) to pass on comments about how to correctly implement procedures for environmental verification, if the verifier observes during his appraisal that an organisation hasn't complied with all environmental regulations. The MoE added some specific questions in its letter dated 29th October 2003. After consulting with the "Accreditation, Examination and Regulation" working group in their 5th, 6th and 7th meetings, the UGA issued the following statement at its 31st meeting on 3rd February 2004 in Berlin:

I.

Legal compliance was and is, in the opinion of the UGA, of particular importance for EMAS¹. The importance of legal compliance was further strengthened by the revision of the EMAS Regulation in April 2001². Enterprises or other organisations must comply with all environmentally relevant legislation at the time of validation³. The EMAS Regulation emphasises this core prerequisite repeatedly. If the environmental verifier observes an infringement of environmental legislation, he shall not validate the environmental statement.

II.

The EMAS Regulation and the German Environmental Audit Act (UAG) have issued different procedures for the different players in evaluating legal compliance, as explained in the following:

¹ already outlined in EMAS I, cf. Regulation (EEC) No. 1836/93.

² cf. preamble No. 17 of Regulation (EC) No. 761/2001 (subsequently referred to as EMAS Reg.).

³ The EMAS Regulation inconsistently refers to "legal compliance" (preamble), "compliance with all relevant regulatory requirements regarding the environment" and "legal provisions with respect to their significant environmental impacts". The UGA assumes there is an obligation at least for compliance with environmental laws in the stricter sense. Furthermore, there must also be compliance with regulations aimed directly at environmental protection and/or those which are environmentally protective by nature. In the opinion of UGA, this also includes overlapping legislation at least in the Fertilizer and Plant Protection Law and/or Animal Protection Law in agriculture, the Mining legislation for the mining industry as well as permit requirements connected to work safety regulations pursuant to the Federal Immission Control Act (BImSchG) in respect of regularly operated plants falling under BImSchG, as stated in UAG-Fachkunderichtlinie (Guidelines on Competence of Environmental Verifiers) from 20th September 2002 (Federal legal gazette BAnz. No. 222 from 28th November 2002, p. 25532).

Before participating in the scheme, the **EMAS applicant organisation** seeks itself systematically to assess its own significant environmental impacts, the existing legal framework⁴ for these impacts and whether it meets these requirements⁵. This procedure of self-evaluation and its results are documented in-house. Any deviations found must be corrected, before the organisation is assessed by an environmental verifier.

In order to recognise all new applicable regulations in good time and analyse their consequences for the organisation, it has to introduce appropriate procedures and prove their effectiveness before validation. On the other hand it is obliged to introduce a procedure for an internal environmental audit (and to have begun implementation of this audit during the first validation). With this procedure it repeatedly checks all its areas of activity, at intervals no longer than three years, including against compliance with currently applicable legislation.

In the course of verification and validation, **the environmental verifier** examines whether appropriate procedures are documented⁶ and whether they appear plausible and complete. The verifier will, while visiting one or several sites, if the organisation consists of these, gather evidence that the procedures are actually being used and that they are effective⁷.

Furthermore, the verifier will determine, by using spot-checks⁸, whether the internal audit procedures are complete and correct and whether legal regulations are actually met. A prerequisite of a sufficient sample is that the data captured is representative according to the risk potential of the products (materials, wastes, processes), activities or services and the age of installations. The selection of spot-checks shall refer to significant environmental risks, such as at installations where incidents have occurred or installations which are forced to have a permit according to the Federal Immission Control Act (BImSchG)⁹. Significant permit documents must, therefore, be examined and these, as well as legal conditions mentioned in the documents, must be compared with the actual condition of the installations and procedures. In particular, spot-checks also include examining measurement reports, analysis results, operational journals and correspondence with authorities.

In case the verifier finds controversial issues or ambiguity during his verification, he will ask the participant to clarify these issues in co-operation with the responsible authority, if necessary. Before validation can be authorised, all discrepancies must be completely removed either through measures taken by the organisation or through substantive legitimisation by the respective authority (exceptions, exemptions, acceptance of a remediation plan etc.). This has to be documented by the environmental verifier in order to substantiate his or her decision.

Only once all the legal discrepancies have been rectified and on-site conditions correspond to those described in the environmental statement¹⁰, will the verifier sign (validate) the environmental statement.

Environmental verifiers are given a high level of responsibility in evaluating legal compliance. As a result they must document their respective findings with special care. In terms of the requirements the EMAS

⁴ see Annex VII 7.2. letter a) EMAS Reg.

⁵ see Art. 3 para. 2 letter a) and Annex II section 2.2 EMAS Reg.

⁶ see Annex V section 5.4.3 EMAS Reg.

⁷ see Annex V section 5.4.1 letter a) and b) EMAS Reg.

⁸ see Annex V in the end of section 5.4.1 EMAS Reg.

⁹ see Environmental Verification Committee Guidelines (UGA) on the tasks of environmental verifiers according to Regulation (EC) No. 761/2001, 4. edition, Bonn, 2001, p. 12.

¹⁰ see Annex III section 3.2 letter f) EMAS Reg.

Regulation place on legal compliance, environmental verifiers are subject to regular supervision pursuant to Art. 15 (1) of the Environmental Audit Act (UAG) as well as, if applicable, to occasional supervision pursuant to Art. 15 (4) of the UAG. Furthermore, they are liable to prosecution for regulatory offences in accordance with Art. 37 (1), No. 12 of the UAG.

The applicant organisation then submits the validated environmental statement to the competent **registration body**¹¹. The registration body checks whether all documents are complete and correct. In a so-called "routine inquiry", it asks the competent environmental enforcement authorities, responsible for the enforcement of environmental protection at each site, whether proceedings have been or are being brought against the organisation for environmental regulation offences or whether there are any other obstacles towards registration. If the authority does not report any such obstacles to the registration body, and, in addition the registration body does not consider that there are any signs of legal offences having been committed, it will then enter the applicant organisation in the public register¹². If there are any reservations, the registration body will not register the applicant organisation until these are dispelled¹³. If the environmental enforcement authority later discovers that an EMAS applicant organisation has committed offences against environmental regulations, it will inform the registration body, which will then discontinue an existing registration¹⁴.

Legal compliance can be assumed in the following example cases:

- If legal requirements, clearly stipulated by an authority order when necessary, are met in good time (fulfilment of investigation, securing, monitoring and/or remediation measures, pursuant to the Federal Soil Protection Act - BBodSchG - or of additional orders pursuant to the Federal Immission Control Act – BImSchG - within the period stipulated therein)
- In case of limit values (precaution values) being exceeded, when there is a legal or officially set transition period for compliance, pursuant to precise administrative regulations (e.g. technical instructions for air pollution control - TA Luft) for the organisation, until expiry of this transition period
- In case the responsible authority has granted an exception admissible by law, e.g. in accordance with Art. 19 of the 17th Federal Immission Control Ordinance (17. BImSchV); Art. 20 of the 1st Federal Immission Control Ordinance (1. BImSchV); Art. 27 (2), Art. 47, Art. 58 (2) of the Closed Substance Cycle and Waste Management Act (KrW- /AbfG)
- In case the responsible authority has granted an exemption from certain requirements permissible by law, e.g. Art. 62 of the Federal Nature Conservation Act (BNatSchG)
- On submission of an administrative file or similar document, issued by the competent environmental enforcement authority, which confirms that the legal status of the organisation has been examined by the authority and the authority concluded, in considering further legal principles (for instance the principle of proportionality), that there is no offence against the law in this individual case; this document must be signed by the authority
- In case of an additional order issued subsequently by the competent environmental enforcement authority, pursuant to Art. 17 of the BImSchG (Federal Immission Control Act) mentioning a transition period

¹¹ see Art. 3 para. 2 letter e) and para. 3 b) EMAS Reg.

¹² see Art. 6 EMAS Reg.

¹³ see Art. 32 and 33 UAG; especially Art. 33 (3) UAG.

¹⁴ see Art. 34 (1) UAG.

- In case of the existence of a binding remediation plan which has been agreed by the competent environmental enforcement authority, pursuant to Art. 13 (6) of the Federal Soil Protection Act – BBodSchG
- Where changes to a collateral clause have been agreed by the competent environmental enforcement authority, pursuant to Art. 12 of the BImSchG

and this has been documented by the organisation in each case, in order to facilitate verification by the environmental verifier.

The organisations may achieve legal conformity by implementing suitable measures. Examples include:

- In the case of non-compliance with limit values, providing evidence of completed emission reduction measures to ensure long-term legal conformity;
- Introducing a floor sealing in a hazardous materials warehouse according to regulations, if this was not or insufficiently implemented;
- In case of an absent permit, subsequently submitting a request for this permit and the submission of this issued permit.

Where legal requirements are yet to be met (e.g. pursuant to a remediation plan or due to a subsequent official order), the EMAS applicant must outline the facts and, if applicable, the relevant agreement with the authority, in the environmental statement (transparency).

The accreditation body (DAU GmbH) then supervises the activities of the environmental verifiers. In case of specific offences being committed by the environmental verifier, the accreditation body will take suitable supervision measures¹⁵. If validation has been approved despite an offence having been committed, this means that there is a considerable lack of quality in the verification, and this will be communicated to the registration body as the reason for a temporary suspension or deletion of registration¹⁶. Independent third parties from other interest groups may also contact the accreditation body if they have specific proof of an organisation's environmental statement being validated despite an offence against environmental law.

In the opinion of the UGA, the procedures described above have proven satisfactory in recent years. These processes are multi-level diverse and require reciprocal regulation, which means that organisations are only included in the register if after thorough examination there is no evidence of their having committed any offences against environmental law.

In practice, a considerable number of EMAS applicants have submitted clarifications to their competent environmental enforcement authorities or have corrected legal discrepancies before their first validation. This proves the importance of further expanding EMAS to ensure full compliance with environmental regulations and to remove law enforcement deficits in the Federal Republic of Germany. A broader base of EMAS applicants would help to close this gap and rapidly improve conditions, particularly in the long term. In this respect the UGA welcomes all activities that support EMAS applications and do justice to the outstanding legal status of participating organisations through regulatory easement.

¹⁵ see Art. 16 (1) of the UAG in connection with section II. 1 of UAG guidelines on Supervision, dated 20th September 2002 (Federal Legal Gazette, BAnz. No. 222 of 28.11.2002, p. 25530).

¹⁶ see Art. 15 (5) of the UAG.

III.

In practice there are occasionally cases, in which legislative discrepancies are tolerated by environmental enforcement authorities by unwritten agreement. Such cases have been reported to the UGA in the past; a small number also among EMAS applicants.

EXCURSUS: Definition of tolerance by regulators

Tolerance is thereby understood as non-enforcement by an authority against a formally and/or substantively illegal condition, of which it has knowledge and from the time at which intervening would actually and legally be possible¹⁷. Authorities are asked to grant persons/organisations, subject to regulations, appropriate periods for the fulfilment of their obligations; in individual cases they can also refrain from intervening and enforcing legal regulations, pursuant to a discretionary decision¹⁸. This includes a case where an environmental enforcement authority temporarily refrains from enforcing legislation in the framework of informal administrative action e.g. in return for an obligation by the addressed person/organisation to be subject to a subsequent overcompensation in environmental impact.

Such tolerance by the regulator does not at all preclude the possibility of an offence against the law having been committed. It cannot disregard the offence against environment law rather, it requires such an offence to have been committed¹⁹. In principle, the environmental verifier cannot assume compliance with all relevant environmental regulations, where the authority accepts an environmentally non-compliant condition. The criterion for interpreting the term "compliance with all relevant environmental regulatory requirements regarding the environment", which stems from Community law, is, firstly, compliance with Community law itself. There recital No. 3 of the EMAS Regulation comes into consideration, where EMAS aims to commit participants of the environmental audit scheme to adopt "a pro-active approach in this field beyond compliance with all relevant regulatory requirements regarding the environment"²⁰.

Generally a simple tolerance by the regulator does not preclude the illegality of an offence²¹. There are, however, approaches in the juristic literature that differentiate here between legal and illegal informal tolerance²². This consideration can only refer to cases of so-called "active tolerance". This means a tolerance with the "knowledge and willingness" of the authority, which goes beyond simply accepting or simply refraining from taking action ("passive

¹⁷ see Hermes/Wieland, Die staatliche Duldung rechtswidrigen Verhaltens [Government tolerance of illegal behavior], Heidelberg 1988, p. 6.

¹⁸ Hueting, Die Wirkung der behördlichen Duldung im Umweltstrafrecht [The effect of official tolerance on environmental criminal law], Berlin 1996, p. 27, 28.

¹⁹ see Ewer, Rechtliche Rahmenbedingungen der Substituierbarkeit behördlicher Kontrollmaßnahmen durch erfolgreiche Teilnahme am EMAS II-System [key legal conditions for substituting official control measures with successful participation in the EMAS II system], in: Dolde (Edit.), Umweltrecht im Wandel [environment law in change], Berlin 2001, p. 353, 356 f.; Heider, Die Bedeutung der behördlichen Duldung im Umweltrecht [The meaning of official tolerance in the environment law], Natur und Recht [Journal Nature and Law] 1995, p. 335, 336.

²⁰ Ewer, in: Dolde (Edit.), Umweltrecht im Wandel [environment law in change], Berlin 2001, p. 353, 357, see also Preamble No. 3 of EMAS Reg.

²¹ see Cramer/Heine, in: Schoenke/Schroeder Rdnr. 20 vor § 324, Strafgesetzbuchkommentar [commentary of criminal law], 26. edition, Munich 2001; Randelzhofer, Die Duldung als Form flexiblen Verwaltungshandelns [Tolerance as a form of flexible administrative action], Berlin 1982; Hueting, Die Wirkung der behördlichen Duldung im Umweltstrafrecht [The effect of official tolerance on environmental criminal law], Berlin 1996.

²² Grentzke, Informales Verwaltungshandeln und Umweltstrafrecht [Non-formal administrative action and environmental criminal law], Freiburg 1990, p. 210 ff.; Hueting, p. 175 ff.

tolerance")²³. Furthermore, it is necessary that the authority is entitled to conduct informal administrative action²⁴. In all cases where public environment law lays down formal administrative proceedings (Art. 63 ff. Administrative Proceedings Act – VwVfG –, a licensing procedure, an environmental impact assessment or other formal procedure) or where requirements must be made in writing, there is no room for official tolerance²⁵.

However, the environmental verifier is bound by the judgement of the competent environmental enforcement authority, if the authority decides that enforcement to establish a legally compliant condition should not be given precedence over retaining a formally and/or substantively illegal condition for a limited period of time, in consideration of other conflicting interests²⁶. In such a case it is evident for the environmental verifier's assessment that all correlative facts are appropriately, precisely and comprehensibly documented. For other cases, the juristic literature has called for documentation to include at least one file note by the administrative authority²⁷. For special documentation requirements in such an exceptional case, see section II above. The environmental verifier is well advised in a critical case to find evidence that "active tolerance" by the authority is really present and that the authority will not include the tolerated discrepancy as an obstacle to registering the applicant with EMAS during the application procedure, pursuant to Art. 33 (3) of the UAG.

²³ see Lenckner, in: Schoenke/Schroeder Rdnr. 62 vor § 32 at the end, Strafgesetzbuchkommentar [commentary on criminal law], 26. edition, Munich 2001: „nicht als konkludent erteilte Erlaubnis“, aber „genehmigungsaehnliche Wirkung einer Duldung“ [“non-conclusive permission”, but “tolerance-based approval”]. Hueting, p. 179: „Duldung als Form der unrechtsausschliessenden Einwilligung“ [“tolerance as a form of consent which aims to exclude unjustness”].

²⁴ Hueting, p. 124 ff.: „Dispositionsbefugnis der Behoerde ueber das umweltrechtliche Schutzgut“ [power of disposal of the authority over the subject of protection according to environmental law].

²⁵ see Lenckner, in: Schoenke/Schroeder Rdnr. 62 vor § 32 at the end; Hueting, p. 179; Grentzke, p. 44; Heider, p. 26.

²⁶ cf. with weighing up the principle of proportionality: Hueting, p. 30.

²⁷ Hueting, p. 176.