

On legal in rem effects and partial asset transfers

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In the context of company sales and asset transfers, official permits (for example for facilities/plants, businesses or other items) must be newly applied for, or be transferred, by the buyer. This process is simplified if the relevant approval decision has an effect in rem, i.e. if it attaches to the property and is therefore transferred independently with it (*in rem effect*). If this effect is not prescribed by law, it must be examined on the basis of specific criteria whether the *in rem effect* applies or not. Particular difficulties arise in this context in the case of partial transfers, i.e. if the respective object is only partially transferred.

1. Effect in rem and partial transfer

1.1. Principles

The term "effect in rem" means the extension of the effect of an official notice (authority decision) to the legal successor of the original recipient of the decision. The notice attaches to the object to which it relates and not to a specific person;

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The decision applies to anyone who has rights to the item (operator, owner).¹

The legal effects of the decision are therefore not affected by a change of ownership of the item. The legal successor enters into all rights and obligations of the administrative law relationship in rem of its predecessor.² All requirements, conditions and authorizations that were originally addressed to a specific, named recipient (the predecessor) also apply to the legal successor after the transfer of the item.

From a procedural point of view, it is questionable whether legal succession to the status of a party to ongoing administrative proceedings is possible in the case of a decision with effect in rem. The underlying administrative procedural laws, namely the AVG³, do not set forth any provisions in this regard; this question must be examined in accordance with the applicable administrative regulations.⁴ If these do not contain any special provisions, it must be determined whether the decision has an effect in rem or only a personal effect.⁵ It is only possible for the legal predecessor to become a party if the decision has an effect in rem.⁶ However, the legal successor must take over the proceedings at the stage at which they are at the time of entry.⁷

1.2. Criteria and delimitations

The effect of the decision in rem may initially be expressly prescribed in the relevant substantive law.⁸ The effect in rem can also only be ordered "conditionally" if the decision is attached to the relevant object, but the competent authority subsequently prohibits the extension of the effect of the decision under certain circumstances, for example due to the lack of reliability of the legal successor.⁹

However, a decision can also have an effect in rem without an explicit legal order. This is the case if the decision relates to an object in such a way that only the characteristics of the object and not those of the person to whom the decision was issued are relevant.¹⁰ It must therefore be examined whether the decision relates exclusively to elements related to the subject matter. Such factual elements may include job descriptions, the layout of the premises and the quality of the technical equipment.¹¹ Other such criteria are adequate protection of workers, certain waste disposal facilities, state of the art technology, impairment of public interests and third-party rights, fire protection and hygiene reports as well as sufficient demand.¹²

Conversely, personal elements, i.e. those relating to the person to whom the decision was issued, may not be taken into account.¹³ These are in particular background checks of the person. As part of such a check, reference is made, for example, to elements such as certain criminal offenses committed with intent, disciplinary measures imposed and outstanding convictions for certain criminal offenses.¹⁴ Other relevant personal characteristics may include sufficient personal authorization, certain certificates of qualification, proof of citizenship, sufficient capacity to act, health suitability, professional qualifications and the necessary proof of training and language skills.¹⁵

However, it is not problematic if the issuance of a decision presupposes the existence of certain elements relating to other persons, such as regulatory personnel appointment of which is required under the law.

An example of demarcation relevant to legal practice are commercial facility permits pursuant to [§§ 74 ff GewO 1994](#)¹⁶ and trade licenses pursuant to [§ 38 GewO 1994](#). A facility permit already has effect in rem pursuant to statutory order.¹⁷ The legal successor is automatically subject to the same rights and obligations, in particular requirements and conditions.¹⁸ On the other hand, trade licenses as personal rights¹⁹ have no effect in rem and therefore do not attach to the business;²⁰ these must therefore be applied for again. It is a subjective public right which is granted after checking personal reliability requirements, in practice these are in particular criminal record certificates and declarations of reasons for exclusion from the trade.²¹

1.3. Partial transfer

Special legal issues arise if there is a mere partial transfer of the objects of the permit on which the decision is based, i.e. only parts of the object or system are transferred to the buyer and these are then operated separately.

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Facility permits and other operating licenses typically relate to the entire business and the rights and obligations arising from them apply jointly to all business owners. The legal dogmatic justification can in our opinion be found in the law on operating facilities: According to the "principle of uniformity", all facilities that are locally and materially related belong to the same operating facility/plant.²² A uniform facility permit is also issued for this uniform facility. A facility therefore represents a de facto as well as a legal unit. This is the case even if more than one business operator is active in a facility as the business owner.²³ Only the facility, the operation or the object is separated locally and factually, but not the legal authorization or the resulting liabilities and responsibilities.

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This can be justified by the fact that the mutual interaction of the individual parts of the facility and their effects on the environment can only be assessed when the facility is viewed as a whole, thus ensuring comprehensive protection of neighbors.²⁴ This also results indirectly from the regulation on modification permits for a facility.²⁵ The modification permit must cover the already approved facility to the extent that this is necessary to safeguard the interests described in [Section 74 \(2\) GewO 1994](#) in relation to the already approved facility.²⁶

If part of a facility is transferred to another person, this means that even if the facility is effectively split into two independent parts, they continue to constitute a single legal entity. There is still only one facility permit, which relates to the entire facility. Therefore, a second facility permit cannot be applied for without further ado, as there can legally only be one (valid) permit for the same operating facility.²⁷

From a liability and responsibility perspective, this would mean that even in the event of a de facto separation of the facility parts (without further rights of influence), all business owners or the responsible persons would be jointly liable for the fulfillment of all requirements of the underlying decision. According to general principles, the business owner is the person who actually operates the commercial facility.²⁸ In the case of a partial transfer of the business, this is several persons (entrepreneurs), i.e. the operators of the individual parts of the facility. Each of them has an influence on the de facto operation of the BA, even if it only affects part of it, and is therefore the business owner. All joint business owners or the responsible persons²⁹ of the business units are personally responsible for fulfilling the requirements of the facility permit. They are generally also liable for violations of the uniform facility permit in accordance with [Section 9 \(7\) VStG](#)³⁰ and [Section 39 GewO 1994](#). These liability principles apply even if the requirements of the uniform decision can be clearly assigned to the individual parts of the facility - i.e. if the areas of responsibility can be clearly delimited from each other and there is no significant overlap with regard to the fulfillment of the requirements. At the level of culpability and reasonableness, the specific scope of liability of individual parties involved can be reduced or excluded if necessary.

The liability risks described above can be excluded by legal separation in addition to civil liability agreements. This is initially achieved through de facto separation by dissolving the local and factual connection of the facility.³¹ Local separation can be achieved, for example, by dividing up infrastructure such as the company canteen and parking spaces and by installing additional walls. The dissolution of the factual connection will often be indicated by the fact that the individual parts of the BA are now operated by different business owners for independent purposes. However, this is not always the case, e.g. a shopping center is to be qualified as an uniform facility.³²

An amendment approval procedure pursuant to [Section 81 \(1\) GewO 1994](#) is required for the division of the conditions and the splitting of the facility permit.³³ In the case of this splitting, interests pursuant to [Section 74 \(2\) GewO 1994](#) are regularly relevant, so that neighbors, among others, must be consulted. If the partial transfer does not lead to an impairment of these interests, an application pursuant to [Section 79c \(2\) GewO 1994](#) can be made.³⁴

In many cases, however, physical separation will be de facto impossible or disproportionate. In such constellations, the mutual responsibilities must be delineated under civil law in the form of a separate responsibility and liability agreement. Such agreements typically only apply to the internal contractual relationship (*inter partes*), but not to third parties - i.e. not to administrative authorities or other third parties (such as competitors who assert claims for injunctive relief under unfair competition law). All aspects of the agreement, from the technical and logistical areas and processes to the legal aspects, must be mapped out and regulated in a binding manner. Responsibilities must be delineated according to the requirements and conditions of the decision and the mutual liability agreements for the existing status - but also for future extensions of the decision - must be regulated; for example indemnity clauses,

guarantees, penalties and special compensation regulations. The allocation of liability can be freely agreed in this relationship, for example according to the user relationship or the polluter-pays principle; the assumption of liability for administrative penalties imposed on regulatory personnel (such as responsible persons under trade law) is partially invalid.

When drafting contracts, particular attention must also be paid to the dispute resolution mechanisms, i.e. from preliminary mediation procedures to court and arbitration clauses; the latter (arbitration) is particularly useful in the absence of bilateral enforcement agreements for court titles (especially in the case of contracting parties whose registered office is outside the EEA) or to exclude the public.

2. Special authorizations

The following is a cursory discussion of some of the most relevant authorizations for public commercial law with regard to their effect in rem.

2.1. Operating license for medicinal products

2.1.1. Effect in rem

The manufacturing, placing on the market and controlling of medicinal products or active substances may only commence on the basis of an establishment license ([Sections 63 ff AMG](#))³⁵ issued by the health authorities. The law does not clarify whether this establishment license has an effect in rem. A distinction must be made here primarily between manufacturing companies and mere marketing companies, whereby control companies with pharmacovigilance systems also play a practically important role.

The operating license relating to the establishment has a real effect if the object of the inspection³⁶ is a manufacturing establishment in whose premises quality-relevant activities are also to be carried out and whose equipment is designed for such activities. In accordance with the statutory directive³⁷, documents relating to the intended activity, the premises and their equipment, the nature of the technical equipment and the competent person (not the applicant himself) must be submitted. In the case of a manufacturing company, the operating license is therefore exclusively factual, so that only these characteristics are relevant; the personal circumstances of the applicant, for example in the form of reliability checks, are not relevant. The assessment is somewhat more complex if the business is exclusively dedicated to placing medicinal products on the market. As far as we, the authors, are aware, the current view of the authorities is that an operating license for such a business does not have any effect in rem. The supporting argument can probably be found in the fact that some of these are purely office operations that are not tied to a specific location or specific tangible assets. The decision therefore lacks the necessary strong materiality.

However, even in the case of distributors, the arguments in favor of qualification as a decision in rem prevail. Even in the case of pure office operations, the operating license is not based on personal characteristics of the applicant, but exclusively on factual elements. According to the law, documents relating to the intended activity, the operating premises and their furnishings and the nature of the technical equipment must be submitted in the same way as for manufacturers (but not the competent person). These are documents such as organization charts, product lists, lists of quality-relevant computer-aided systems and a description of the company in accordance with AMBO 2009.³⁸

The qualification is even clearer for distributors with storage facilities. Equipment-intensive cold chains and other localized equipment are often required here.³⁹ The materiality aspect undoubtedly applies here. From a legal point of view, unequal treatment of manufacturers and distributors with regard to the effect in rem would probably not be objectively justified.

2.1.2. Partial transfers

In the case of partial transfers of pharmaceutical companies, similar questions arise as under the law on operating facilities. The assessment of the principle of uniformity is also relevant here. This is because it is based on the same legal principles. The authorities (here: BASG/AGES) issue a uniform operating license for an uniform pharmaceutical establishment. This approved establishment therefore represents a de facto and legal unit. This is because the mutual interaction of the individual parts of the establishment and their effects on safety and quality can only be assessed when the pharmaceutical establishment is viewed as a whole, thus ensuring comprehensive patient protection.

Similar to the application for a change in the law on operating facilities, the legal splitting of the establishment license under medicinal product law could be implemented by an application pursuant to [§ 65 para. 1 AMG](#). The separation of the establishment as well as the desired splitting of the notification can generally be classified as significant changes within the meaning of [§ 65 para. 1 AMG](#). Such a

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project is capable of having an effect on the required quality of the medicinal products or active substances or the production or distribution program. The effect in rem also means that the transferee must also be authorized to act vis-à-vis the authority pursuant to [Section 65 AMG](#). This is reinforced by the fact that the transferee must appoint a competent person in the manufacturing area and an inspection must also take place in accordance with [Section 67 AMG](#) (which is carried out at the discretion of the authority). Theoretically, this procedure in accordance with [Section 65 AMG](#) has legal advantages such as a shorter official processing period and (at the discretion of the authorities) the omission of an inspection in accordance with [Section 67 AMG](#).

However, if the effect in rem of the authorization is not recognized by the authorities, the seller must restrict the authorization in accordance with [Section 65 AMG](#) and the buyer must submit a regular application in accordance with [Section 63 AMG](#).

2.2. Medical devices

Licenses for establishments for the manufacture, storage and trade of medical devices are largely comparable to pharmaceutical establishments; they will regularly be subject-related and thus have an effect in rem. However, so far no corresponding ordinance pursuant to [Section 65 \(1\) and \(2\) MPG 2021](#)⁴⁰ has yet been issued for this healthcare product area, in which (among other things) the licensing conditions are specified.

2.3. Radiation protection

Depending on the type and hazard potential of the radiation source, the StrSchG 2020⁴¹ requires either only an installation license, a license to carry out the activity or both licenses (two-stage licensing procedure).⁴² These licenses have a legal effect in rem:⁴³ A change of license holder has no effect on the validity of the license. The new holder merely has to notify the competent authority of the fact of the change of holder.⁴⁴ In our opinion this can be described as a "conditional" in rem effect: One of the requirements for the granting of the license is the reliability of the applicant for the license, i.e. a personal element.⁴⁵ If the authority has concerns regarding the reliability of the legal successor, it can subsequently prohibit the continuation of the establishment or activity by means of an official decision.⁴⁶

Furthermore, so called type approvals⁴⁷ also have an effect in rem.⁴⁸ However, it is questionable whether this also applies to radiation device marketing authorizations.⁴⁹ One argument against this is that the effect in rem for this

is not ordered by law. However it is supported by the fact that the only non-factual component is also the reliability of the applicant and that different treatment does not appear appropriate in this case.⁵⁰

2.4. Pharmacies

Similar to commercial facility permits, the approval of a business premises pursuant to Section 6 para. 4 ApoG⁵¹ expressly has an effect in rem.⁵² This however is not the case with pharmacy licenses, which are based on personal elements.⁵³

2.5. Nursing homes

According to recent case law, the operating license for nursing homes pursuant to Section 15 StPHG 2003⁵⁴ has an effect in rem.⁵⁵ Only factual elements are relevant, which is why the license has an effect on every operator.⁵⁶

2.6. Hospitals/Healthcare Organizations

Pursuant to [Section 5 KaKuG](#)⁵⁷, the establishment and operating licenses⁵⁸ have no effect in rem due to their personal nature.⁵⁹ A transfer procedure is therefore always required, in the course of which the reliability of the new operator must be checked.⁶⁰

2.7. Railroads

The building permit under railroad law in accordance with [Section 31 EisbG](#)⁶¹ has an in rem effect due to its exclusive materiality.

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This also applies to the operating permit under railroad law,⁶² which relates exclusively to the object covered by the building permit.⁶³ The same should in our opinion go for type approvals under railroad law and the associated operating license for railroad safety equipment⁶⁴ and for rail vehicles.^{65, 66}

2.8. Water usage rights

In the case of water usage rights as defined in [Section 22 WRG 1959](#)⁶⁷, a distinction must be made between the different statutory usage rights. Permits for non-stationary water utilization facilities have no effect in rem, as they are limited to the person entitled to the water. Other rights to use water are connected to an operating facility or property, which is why they have an effect in rem.⁶⁸ The transfer of these rights must be reported in the water register in accordance with [§ 124 WRG 1959](#).⁶⁹

2.9. Building permits

Building notices/decisions have an effect in rem due to their factual nature. These are liable to the building or property concerned. The same applies to building approvals, as these relate to the specific building site.⁷⁰

3. Conclusion

The effect of a decision in rem means the extension of the effect of the decision to the legal successor of the original recipient of the decision, in particular in the context of company sales and asset transfers. This effect arises by virtue of statutory order or from the mere interpretation of the law. The in rem effect applies if the decision relates to the item (e.g. a facility/plant or business) in such a way that the characteristics of this item are exclusively relevant (materiality).

The relevant elements are, for example, job descriptions, furnishing of the premises, quality of the technical equipment and adequate protection of the workforce.

Conversely, personal elements, i.e. in particular background checks, certificates of competence as well as training and personal authorizations, prevent a decision having an effect in rem. However, mixed constellations can arise by virtue of statutory order (conditional effect in rem).

Special issues arise in the case of mere partial transfers, i.e. when only parts of the property are taken over within the scope of the effect of the decision in rem. Even if the plant, business or other property is separated in terms of location and subject matter, there is still no separation in the legal sense. Only the object is spatially and factually separated, but not the legal authorization or the resulting liabilities and responsibilities. This follows from the principle of uniformity, according to which the entire object and its effects (e.g. protection of neighbors and patients) are examined and approved by the authorities. Therefore, there is a risk that even if the facility is locally and materially separated, all business owners or responsible persons, in some cases also the management, are still jointly responsible for all violations (such as breaches of conditions and requirements) and are personally liable for them.

In such cases, the matter must be legally separated and approved. In the context of the effect in rem, this will regularly take place via change approvals (if provided for in the relevant material law). In the case of pharmaceutical companies, for example, the operating license has an effect in rem; partial transfers can be affected by means of a change notification.

If a physical separation is not factually possible or disproportionate, the mutual responsibilities must be regulated internally in the form of a responsibility and liability agreement. The responsibilities must be delineated according to the conditions and terms of the decision and the reciprocal liability agreements, such as indemnification and hold harmless agreements, must be regulated for the existing status and, if possible, for future extensions of the decision.

¹ VwGH 27. 10. 1997, 96/10/0255; 10. 10. 2007, 2006/03/0151; 26. 11. 2020, Ra 2019/11/0107.

² VwGH 12. 6. 1986, 86/06/0020; 17. 9. 1991, 90/05/0186; 15. 9. 2011, 2009/04/0112.

³ General Administrative Procedure Act 1991 (AVG) BGBl 1991/51 as amended by BGBl I 2018/58.

⁴ Cf. on building procedures: VwGH 15. 9. 1992, 92/05/0057; 27. 2. 1996, 95/05/0259; 24. 4. 1997, 96/06/0284.

⁵ See only *Hengstschläger/Leeb*, AVG § 8 (2014) Rz 24-26.

⁶ VwGH 24. 10. 2000, 2000/05/0020; 23. 5. 2002, 2002/05/0025.

⁷ VwGH 14. 9. 1993, 91/07/0126.

⁸ Cf. only Section 6 ApoG, which stipulates that a change of license holder does not require a new license.

⁹ Section 20 (3) StrSchG 2020.

¹⁰ VwGH 30. 10. 1991, 91/09/0047; 17. 7. 1997, 96/09/0208; 24. 10. 2000, 2000/05/0020.

¹¹ § 63 para. 2 AMG.

¹² See § 15 para. 6 StrSchG 2020; § 31f para. 1, § 32b para. 1 and § 33b para. 1 EisbG; § 12 WRG 1959; § 15 para Section 5 StPHG 2003; Section 3 (2) KAKuG.

¹³ VwGH 30. 10. 1991, 91/09/0047; 17. 7. 1997, 96/09/0208; 24. 10. 2000, 2000/05/0020.

¹⁴ Cf. § 13 para. 1 GewO 1994; § 3b para. 2 ApoG.

¹⁵ Cf. § 8 para. 1, §§ 16 ff GewO 1994; § 3 para. 1, § 3b para. 1 ApoG.

¹⁶ Austrian Trade Act 1994 (GewO 1994) BGBl 1994/194 as amended by BGBl I 2022/204.

¹⁷ Section 80 (5) GewO 1994.

¹⁸ VwGH 21. 11. 2001, 2000/04/0197.

¹⁹ Section 38 (1) GewO 1994.

²⁰ § 38 para. 1 GewO 1994; VwGH June 18, 1996, 96/04/0111.

²¹ § 13 GewO 1994.

²² VwGH 19. 3. 2003, 2001/04/0065; 18. 3. 2015, Ro 2015/04/0002.

²³ VwGH 30. 10. 1990, 90/04/0143.

²⁴ VwGH 1. 10. 1985, 84/04/0155; 18. 3. 2015, Ro 2015/04/0002.

²⁵ Section 81 (1) GewO 1994.

²⁶ § 81 para. 1 last sentence GewO 1994; VwGH 1. 10. 1985, 84/04/0155.

²⁷ VwGH 31. 3. 1992, 91/04/0305; 17. 3. 1998, 97/04/0139.

²⁸ The owner is anyone who has an item in their custody. It is therefore not the legal circumstances that are important, but the direct possession, i.e. the possibility to influence the factual events in the business. See VwGH 21. 11. 2001, 2000/04/0197.

²⁹ In the case of operating facilities, the managing director under trade law.

³⁰ Austrian Administrative Penal Act 1991 (VStG) Federal Law Gazette 1991/52 as amended by Federal Law Gazette I 2018/58.

³¹ VwGH 19. 3. 2003, 2001/04/0065; 18. 3. 2015, Ro 2015/04/0002.

³² VwGH 30. 10. 1990, 90/04/0143.

³³ See VwGH 17. 3. 1998, 97/04/0139; 31. 3. 1992, 91/04/0305.

³⁴ Thus *Dworak/Jantscher*, Die Teilung von gewerblichen Betriebsanlagen, wbl 2017, 377.

³⁵ Federal Act of March 2, 1983 on the Manufacture and Placing on the Market of Medicinal Products (Medicinal Products Act - AMG) Federal Law Gazette 1983/185 as amended by Federal Law Gazette I 2022/8.

³⁶ § 67 AMG.

³⁷ § 63 AMG.

³⁸ Ordinance of the Federal Minister of Health on companies that manufacture, control or market medicinal

products or active pharmaceutical ingredients and on the brokering of medicinal products (Arzneimittelbetriebsordnung 2009 - AMBO 2009) Federal Law Gazette II 2008/324 as amended by Federal Law Gazette II 2019/41.

³⁹ Additional documents are also required, such as space allocation plans for the individual floors and documentation of the equipment and qualification of the devices and equipment required to store the products.

⁴⁰ Federal Act on Medical Devices 2021 (Medical Devices Act - MPG 2021) Federal Law Gazette I 2021/122 as amended by Federal Law Gazette I 2023/27.

⁴¹ Federal Act on Measures to Protect against Dangers from Ionizing Radiation (Radiation Protection Act 2020 - StrSchG 2020) Federal Law Gazette I 2020/50.

⁴² §§ 15 ff StrSchG 2020.

⁴³ Section 20 (1) StrSchG 2020.

⁴⁴ Section 20 (2) StrSchG 2020.

⁴⁵ Section 15 (6) no. 2 StrSchG 2020.

⁴⁶ Section 20 (3) StrSchG 2020.

⁴⁷ § 33 StrSchG 2020.

⁴⁸ Section 35 (7) StrSchG 2020.

⁴⁹ § 32 StrSchG 2020.

⁵⁰ Section 32 (3) StrSchG 2020.

⁵¹ Act of December 18, 1906, concerning the regulation of the pharmacy sector (Pharmacy Act), RGBl 1907/5 as amended by Federal Law Gazette I 2022/65.

⁵² Section 6 (4) ApoG.

⁵³ Section 12 (1), Section 15 (1) ApoG.

⁵⁴ Act of July 1, 2003 on nursing and care in nursing homes and care places (Stmk. Nursing Home Act 2003 - StPHG 2003) LGBl 2003/77 as amended by LGBl 2022/91.

⁵⁵ VwGH 18. 4. 2012, 2010/10/0206.

⁵⁶ Cf. however VwGH 21. 5. 2008, 2003/10/0219, where the operating license was still assessed as a personally granted right.

⁵⁷ Federal Act on Hospitals and Health Resorts (KAKuG) BGBl 1957/1 as amended by BGBl I 2022/79.

⁵⁸ §§ 3, 3a KAKuG.

⁵⁹ VwGH 15. 10. 2015, Ro 2014/11/0031.

⁶⁰ The transfer of a hospital requires the approval of the provincial government and, in the event of changes or the establishment of a new hospital, a change approval procedure pursuant to § 4 KAKuG or a new approval pursuant to § 3 or § 3a KAKuG may also be required; see § 5 KAKuG.

⁶¹ Federal Act on Railways, Rail Vehicles on Railways and Traffic on Railways (Railway Act 1957 - EisbG) BGBl 1957/60 as amended by BGBl I 2021/231.

⁶² § 35 EibG.

⁶³ VwGH 3. 9. 2008, 2005/03/0219.

⁶⁴ §§ 33 ff EibG.

⁶⁵ §§ 32 ff EibG.

⁶⁶ Cf Catharin/Gürtlich/Walder-Wintersteiner, Eisenbahngesetz4 § 35 EibG (2021) Rz 1.

⁶⁷ Water Rights Act 1959 (WRG 1959) Federal Law Gazette 1959/215 as amended by Federal Law Gazette I 2018/73.

⁶⁸ § 22 para 1 WRG 1959.

⁶⁹ § 22 para 2 WRG 1959.

⁷⁰ VwGH June 21, 1990, 89/06/0104; January 23, 2007, 2003/06/0039.



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