



ENVIRONMENTAL LAW SERVICE

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II. State concerned CZECH REPUBLIC

III. Facts of the communication

In the EU Emission Trading System the new rules will apply starting in 2013, according to which emission allowances will mainly be purchased in auctions. However, the Czech Republic can apply for an exemption - derogation to allocate a certain number of allowances free-of-charge. The Czech Republic has decided to apply for this option and has prepared and submitted the documents required by the European Commission, specifically the application and the National Investment Plan. The National Investment Plan has to provide for investments in retrofitting and upgrading of the infrastructure and clean technologies, also for the diversification of the country's energy mix and sources of supply. In course of the preparation and adoption of the Czech application and the National Investment Plan the Czech authorities have failed to comply with the Article 7 of the Aarhus Convention (in conjunction with applicable provisions of Article 6, para.3, 4, 8) providing for the public participation during the preparation of plans and programmes relating to the environment.

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1. General background

The EU Emissions Trading System established by the EU ETS Directive 2003/87/EC¹ is the cornerstone of the EU's strategy for fighting climate change. Directive 2009/29/EC² brings substantial changes in the EU Emissions Trading System. Article 10 of the EU ETS Directive 2003/87/EC as amended by the Directive 2009/29/EC (hereinafter referred to as the “revised EU ETS Directive”) sets out the obligatory auctioning of the emission allowances for the power sector within the revised community scheme from 2013³. The exception to this rule is laid down in Article 10c of the revised EU ETS Directive that provides for the option of allocating a limited number of free emission allowances to power generators for a transitional period until 2019 the so called “Optional derogation -transitional free allowances for power generators”⁴.

The option under Article 10c of the revised EU ETS Directive is available to ten member states whose electricity systems meet certain criteria, with the Czech Republic among them. The aim of this provision is to help to modernise their electricity sector, thus helping them to overcome the disadvantage resulting from their national circumstances and gradually prepare their energy sector for full auctioning as the preferred method. One of the factors leading to this agreement was to help the power sector in these member states to cope with the costs and the requirement of making the transition to less carbon-intensive electricity generation.⁵ Member states deciding to use this option must, in parallel, undertake actions aimed at securing investments in the energy system, such as upgrades of infrastructure, clean technologies etc., of an amount corresponding to the value of the emission allowances allocated for free.

Pursuant Article 10c of the revised EU ETS Directive, para.1, the eligible member state shall submit to the Commission a national plan that provides for investments in retrofitting and upgrading of infrastructure and clean technologies; the national plan shall also detail how the diversification of the energy mix and sources of supply are to take place. This requirement of the Directive is developed further by the Communication from the Commission - Guidance document on the optional application of Article 10c of Directive 2003/87/EC, hereinafter referred to as the Guidance document⁶ stating that the investments identified in the national plan should contribute to decreasing greenhouse gas emissions in a cost effective manner, further they should contribute to the diversification, as well as reduction in carbon intensity, of the electricity mix and the sources of energy supply for electricity production⁷.

¹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC. L 275 32 25.10.2003.

² Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, L 140 63 5.6.2009.

³ Article 10 of the Directive 2009/29/EC, Auctioning of allowances: “From 2013 onwards, member states shall auction all allowances which are not allocated free of charge in accordance with Article 10a and 10c”.

⁴ More information can be found on the dedicated EC website, see:
http://ec.europa.eu/clima/policies/ets/auctioning/derogation/index_en.htm.

⁵ Questions and Answers: Rules and guidance on allocation of free allowances to the power sector,
http://ec.europa.eu/clima/policies/ets/auctioning/derogation/faq_en.htm.

⁶ Communication from the Commission, Guidance document on the optional application of Article 10c of Directive 2003/87/EC (2011/C 99/03), C 99 9, 31.3.2011, hereinafter referred to as the Guidance document.

⁷ See para.23 of the Guidance document, „Principles for the National Plans“.

Further, Article 10c of the revised EU ETS Directive, para.5 stipulates that „any Member State that intends to allocate allowances on the basis of this Article shall, by 30 September 2011, submit to the Commission an application containing the proposed allocation methodology and individual allocations⁸. An application shall contain: (a) evidence that the Member State meets at least one of the conditions allowing for the derogation; (b) a list of the installations covered by the application and the amount of allowances to be allocated to each; (c) the national plan⁹; (d) monitoring and enforcement provisions with respect to the intended investments pursuant to the national plan; (e) information showing that the allocations do not create undue distortions of competition”.

The derogation under Article 10c of the revised EU ETS Directive is optional. Eligible member states need to decide whether they want to make use of this option or not. According to the European Commission, the member states need to decide for how many years and to what extent they want to make use of the derogation, as the Directive defines only maximum values in this regard¹⁰.

It is important to mention that the Czech application with accompanying National Investment Plan once submitted to the European Commission are final in terms that no other projects – investments can be added. The follow up process of approval by the European Commission gives space for the Commission to assess and decide whether the application fulfil the Directive’s requirements and the Commission can reject the application as a whole or in part if it deems that it does not conform with the rules set out in the Directive, however the process of preparation and adoption on the Czech level is finished.

Once the Czech application and the National Investment Plan are approved by the Commission they become binding for the Czech Republic as well as for the investors proposing the investments. This results from Article 10c of the revised EU ETS Directive stipulating that the member state shall submit every year a report on investments made in upgrading infrastructure and clean technologies. Further it states that any member state applying this article shall require benefitting electricity generators and network operators to report every 12 months on the implementation of their investments referred to in the national plan. The report shall be sent to the Commission and shall be made public.¹¹

The revised EU ETS Directive entered into force on 25 June 2009. The Czech Republic has decided to apply for the derogation under Article 10c and started its work on the future use of derogation already in 2009.

⁸ The free emission allowances are to be allocated to each eligible installation in a Member State. Their number is determined by the allocation methodology applied. There are two allocation methodologies, one using ex-ante efficiency benchmarks and the other based on the annual average verified emissions of the power plants concerned in 2005-2007. See: Questions and Answers: Rules and guidance on allocation of free allowances to the power sector, http://ec.europa.eu/clima/policies/ets/auctioning/derogation/faq_en.htm.

⁹ For the purpose of this communication we refer to the national plan prepared by the Czech Republic to as a „National Investment Plan“ or “NIP”.

¹⁰ Questions and Answers: Rules and guidance on allocation of free allowances to the power sector, http://ec.europa.eu/clima/policies/ets/auctioning/derogation/faq_en.htm.

¹¹ Article 10c of the revised EU ETS Directive, para.4.

2. The Czech application and the National Investment Plan

In the Czech Republic the provisions of the revised EU ETS Directive were transposed by the Czech Act No. 695/2004 Coll.¹² Pursuant Article 10a of the Act No. 695/2004 Coll. the Ministry of Environment invites up to 31 October 2009 electricity producers to submit the necessary documents for the processing of the application. It also specifies that the Ministry of Environment submits an application by 30 November 2010 to the government and publishes in a manner that allows a remote access.

The Ministry prepared an application and published it with a delay after our request in early December 2010. However, no public consultation or other form of the public participation took place. These steps were taken before the release of the Guidance document by the European Commission. Therefore, the Ministry of Environment had to invite investors to supplement their documents with regard to the principles set out in the Guidance document. Subsequently, the Ministry of Environment reworked the application and published the final version in August 2011. In September 2011 it was submitted to the Commission.

The Czech application stipulates that for the period in question the 108 mil. of free allowances will be distributed among 51 operators/85 installations generating electricity. The Czech authorities claimed that derogation will stimulate investments in an environmental area and will have positive impact not only on the environment but also on employment and economy. Applying for the derogation under Article 10c of the revised EU ETS Directive will be the key stimulus for the Czech energy sector, primarily, it will have positive impact on emission reductions, and secondarily on the air quality in particular areas.¹³

The Czech application sets out that the accompanying National Investment Plan fulfils the principles required by the Commission with regard to the nature of investments. The Czech authorities argue that the operators claimed the compliance of their investments with the set up principles, so the plan as such will lead to the emission reductions, to the diversification of the energy sources, further, the investments will not cause undue distortions of competition and they will not strengthen the dominant positions on the market. In their words, the main objective is to decrease the Czech dependence on the fossil fuels (coal). In addition, planned projects have a long lifespan that will last over the period of the allocation of the free allowances.

With regard to the transparency and public consultations relating the National Investment Plan, the Czech application states that the Ministry of Environment cooperated with the Ministry of industry and commerce, Ministry of finance and also with the representatives of the energy sector. Further it states, that the National Investment Plan will be released on the Ministry of Environment's website for the public consultations before its presentation to the Government and that the Ministry of Environment will take into account all comments received in the due period.¹⁴

¹² Act No. 695/2004 Coll. on Terms of Trading with Greenhouse Gas Emission Allowances and on Amendments to Certain Acts, Article 10a.

¹³ Page 4 of the Czech application.

¹⁴ Page 17 of the Czech application.

2.1. Czech application and the National Investment Plan within the scope of the Aarhus Convention

With regard to question whether the Czech application with the accompanying National Investment Plan fall within the scope of the plan and programmes under Article 7 of the Aarhus Convention we refer to the definition of the “plans and programmes” in the SEA Directive¹⁵ as we perceive it as an appropriate interpretation tool.

Pursuant Article 2 of the SEA Directive “plans and programmes” shall mean plans and programmes, as well as any modifications to them that are: subject to preparation and/or adoption by an authority at national, regional or local level, or which are prepared by an authority for adoption, through a legislative procedure by parliament or government, and which are required by legislative, regulatory or administrative provisions.

The Czech application, in particular the National Investments Plan, fulfils these criteria for the “plans and programmes” as it was prepared by the authority at the national level – the Ministry of Environment, its preparation is required by the legislative provisions of the Act No. 695/2004 Coll., and lastly, it was adopted by the Czech Government¹⁶.

Article 3 para.8 of the SEA Directive narrows down the definition of plans and programmes, stating that the plans and programmes of which the sole purpose is to serve national defence or civil emergency and financial or budget plans and programmes are excluded from the scope of the directive.

It is clear that the purpose of the Czech application and the National Investment Plan is not to serve the national defence or civil emergency. With regard to the exclusion of the financial or budget plans and programmes we refer to the purpose of the application and the national plan that is to stipulate the energy policy of the member states wishing to apply for the derogation. These documents will set up a framework for the modernisation and investment processes of the energy sector; for the reduction of the greenhouse gas emissions, for almost ten years¹⁷, thus predetermining the transition towards more efficient low carbon economy. The member state has to ensure that investments are undertaken in retrofitting and upgrading the infrastructure, in clean technologies etc. with additional requirement that the overall amount of these investments must match the market value of the allowances allocated for free. Hence, it is obvious that the primary intent of the national plan under Article 10c of the revised EU ETS Directive is not to solely distribute the financial incentives to projects, but to provide the energy sector in those disadvantaged member states with the opportunity to diversify their energy mix, to support the development of clean technologies, to increase energy efficiency, etc. through the provisional free allowances. Therefore, it does not qualify as a financial or budget plan.

¹⁵ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, L 197 , 21.07.2001.

¹⁶ See: http://www.mzp.cz/en/news_110922_emission_allowances.

¹⁷ Questions and Answers: Rules and guidance on allocation of free allowances to the power sector, http://ec.europa.eu/clima/policies/ets/auctioning/derogation/faq_en.htm. “The maximum period for which the derogation can be authorized is from 1 January 2013 to 31 December 2019. Full auctioning in the power sector will be applied from 2020 onwards.”

On the basis of the above mentioned reasons, the Czech application and the National Investment Plan fall under the definition of the plan and programmes as it is understood under the SEA Directive and we refer to the previous findings of the Compliance Committee which refer to the definition of “plans and programmes” in the European Commission Guide for Implementation of the SEA Directive¹⁸.

Article 7 of the Aarhus Convention further refers to the plans and programmes “relating to the environment”. Whether a particular plan or programme relates to environment should be determined with reference to the implied definition of “environment” found in the definition of “environmental information” (art. 2, para. 3). The Czech application and the National Investment Plan can be defined as a “factor” affecting or very likely to affect the elements of environment such as air, atmosphere and taken from a wider perspective could have impact on all elements of the environment as defined in para.3 (a) of Article 2 as the energy sector clearly affects the whole territory and life therein¹⁹.

2.2. The Czech legislation providing for the public participation during preparation of plans and programmes relating to the environment

SEA Directive (together with the EIA Directive) is transposed into the Czech legal system in the Act No. 100/2001 Coll. (hereinafter the EIA Act).²⁰ Under Article 1, para.2 “plans and conceptions as delimited in this Act, the implementation of which could have serious environmental impact, shall be subject to environmental impact assessment”. Pursuant Article 3, “conception shall be strategies, policies, plans or programs prepared or farmed out by a public administration authority and subsequently approved or submitted for approval by a public administration authority”.

In our opinion the Czech application and the National Investment Plan fall under the definition from the Czech EIA Act as they have been prepared and approved by the relevant authority, they will have serious environmental impact and thus should be subject to the environmental impact assessment under the Czech law.

In the document called Annex II to the Czech application, “the Methodical Report”, the Czech authorities claimed that the Ministry of Environment has considered whether it is necessary to carry out the environmental assessment of the National Investment Plan²¹, however in their opinion the plan does not fulfil the characteristics of the conception, thus cannot be considered the conception under this act and thus, no assessment is required. In addition, the National Investment Plan does

¹⁸ Findings and recommendations with regard to compliance by Albania, ECE/MP.PP/C.1/2007/4/Add.1 31 July 2007.

¹⁹ According to the press release of the Ministry of Environment: „In the context of this programme, a total of CZK 138 billion will be invested by 2020, which will ultimately lead to a positive effect, not only in reducing emissions (by about 12 million tonnes of CO₂), but also in increasing employment and strengthening the economy as a whole. “Further:”..., the Czech Republic can apply for a derogation to allocate a certain number of allowances free-of-charge also to power plants and heating plants producing electricity– under the condition that at least their value will be invested into modernisation of energy production and reduction of the burdening of the environment by this sector.” Available at: http://www.mzp.cz/en/news_110922_emission_allowances.

²⁰ Act No. 100/2001 Coll. on Environmental Impact Assessment and Amending Some Related Acts.

²¹ This is also the requirement from the Guidance document, para.26, „On the basis of the provisions of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, Member States should verify whether an environmental assessment of the national plan is required.“

not fall under the EIA act as the financial and budget plans and programmes do not fall within its scope.

As argued above, the Czech application and the National Investment Plan clearly will have the impact on environment and their main objective is the modernisation of the energy sector in the Czech Republic and not providing the financial support for the investments. The National Investment Plan presents the framework that shall ensure the shift and modernisation of the energy sector (Article 10c, para.1, “the national plan provides for retrofitting and upgrading the infrastructure and clean technologies”) in the defined period of time (2013-2019), thus being a kind of strategy for the upcoming period. In addition, a number of the planned investments from the list will be subject to the future environmental impact assessment.

The EIA act provides the legal framework allowing the public to participate in preparation of the strategies, policies, plans and programmes. However, in this case the Ministry of Environment (that would be responsible for carrying out the strategic environmental assessment for the Czech application and the National Investment Plan) refused to implement these provisions and no public participation under the EIA Act took place.

2.3. Public participation during the preparation and adoption of the Czech application and the National Investment Plan

The process of the final preparation and the adoption of the Czech application and the National Investment Plan was as follows. On 19 August 2011 the Ministry of Environment published the application on its website with the opportunity for the public to send their comments until the 26 August 2011.²² This information was not publicly announced; moreover it was not published in a clear way on a visible part of the website, thus clearly making it difficult for the public to respond and to participate.

Pursuant **Article 6 para.3** applicable to Article 7 of the Aarhus Convention stating that public participation procedures shall include reasonable time-frames allowing sufficient time for informing the public, we are persuaded that the one week period is insufficient for the public to learn about the consultation process and subsequently to provide the comments. The one week from 19 August 2011 until 26 August 2011 could be seen only as a “pro forma” public consultation not the real opportunity to effectively participate.

Moreover, the released information and available documents did not include the most essential part of the application – the National Investment Plan. The document “Investments²³” was published on the website only after the public consultation was closed. Thus, the public did not have an opportunity to review and assess it. The public therefore could not provide comments and insights with the necessary knowledge about concrete investments applying for the free allowances. This is clearly in breach with requirements of **Article 7** of the Aarhus Convention stating that the public shall be provided with the necessary information.

²² <http://mzp.cz/cz/derogace>.

²³ See: „Investice.pdf” available at <http://mzp.cz/cz/derogace>. The National Investment Plan that is attached to this communication was obtained from an anonymous source before the public consultation was closed.

The communicant²⁴ submitted its comments on 26 August 2011. NGOs explained their main concerns with regard to the questionable reasons for application for the derogation, the problematic functioning of the EU ETS, the failure of the National Investment Plan to comply with the principles required by the European Commission and to achieve the environmental objective, the questionable allocation method chosen by the Ministry of Environment and last but not least the flawed process of the documents' preparation. As to the process, the main argument was that for these documents the Strategic Environmental Assessment is required under the Czech law, however the Czech authorities have ignored this obligation, thus did not allow the public to effectively participate. The questionable publication of the materials and invitation for public consultation were also mentioned. Further, the communicant has claimed that by not providing the public with the core part of the application, the National Investment Plan, the public participation was restricted from the very beginning.

On 21 September 2011 the Czech application together with the National Investment Plan was approved by the Government and later on were submitted to the European Commission (before the end of September 2011).

Pursuant **Article 6, para.8** applicable to Article 7 of the Aarhus Convention, in the decision making due account has to be taken of the outcome of the public participation. According to all available evidence, the Ministry of Environment neither dealt with comments from the public, nor has it taken into account the outcomes of the public consultations while deciding on the Czech application and the National Investment Plan. Neither were the comments from the public formally replied to, collected or published for the public information. In our opinion the relevant authority (the Ministry of Environment) has not seriously considered the substance of all comments received. To conclude, the relevant authorities did not take due account of the outcome of the public participation thus constituted a failure to comply with Article 7.

As already mentioned, the preparatory process ran already from year 2009 until September 2011 and it is reasonable to expect that during that period an appropriate opportunity for an effective public consultation existed. The operators were invited to submit their proposal already in 2009 and the first application was released in 2010, however without any opportunity for public to participate.

With regard to the timing of the public consultation – the end of August and the binding deadline provided by the Directive – 30 September 2011, we conclude that the public consultation was not provided in the time when all options were opened and the public could effectively provide its views and comments on the content in question. This constitutes failure to comply with **Article 6, para.4** applicable to Article 7 of the Aarhus Convention.

IV. Nature of alleged non-compliance

This communication presents the specific case in which the Czech Republic has failed to comply with the provisions of the Aarhus Convention. In our opinion during the preparation of the Czech application and accompanying National Investments Plan the Czech Republic failed to comply with the provisions of the Aarhus Convention, namely Article 7, in conjunction with Article 6, paragraphs 3, 4 and 8.

²⁴ Together with other NGOs from the Czech Republic – Friends of the Earth Czech Republic, Centre for transport and energy, Greenpeace and Green Circle.

This specific case provides an example of the situation in which the Party to the Convention has established framework for the public participation during the decision making on plans, programmes and policies by implementing the strategic environmental assessment. However, in case the Party decides that no strategic environmental assessment is necessary and it will not be conducted, there is no other framework for the public participation available and the public lose opportunity to participate, thus to enjoy the rights for public participation established by the Article 7 of the Aarhus Convention.

V. Provisions of the Convention relevant for the communication

Article 7, in conjunction with Article 6, paragraphs 3, 4 and 8.

VI. Use of domestic remedies or other international procedures

The communicant continued its effort to raise this issue also after the closure of the consultation process in August 2011. Before the meeting of the Government in September he has sent the public request to the Czech Government calling for the rejection of the Czech application and the National Investment Plan.²⁵

On 14 October 2011 the communicant submitted an appeal to the Prime Minister through the Office of the Government against the Government's approval of the Czech application and the National Investment Plan. On 21 November the communicant got a reply from the Ministry of Environment (which got authorisation to deal with his request from the Office of the Government) stating that due to the legal nature of the Government's approval of the Czech application it is not possible to submit an appeal against this decision. The Ministry also replied to the raised objections against the Czech application and the National Investment Plan. In relation to communicant's claim that there was no Strategic Environmental Assessment carried out for the application and the National Investment Plan that would ensure the public participation the Ministry stated that the documents do not fall under the EIA Act, thus such assessment was not required. As to the insufficient publication of the documents the Ministry claimed that it was published on 19 August 2011 in a manner allowing a remote access and the list of investments (National Investment Plan) was due to the additional amendments released later but still before the end of the public consultation period.

On 20 January 2012 the communicant submitted a measure against inactivity to the Prime Minister (via the Office of the Government) as the Communicant did not receive any decision on its appeal from October 2011. We received a letter from the Office of the Government on 28 February 2012 as

²⁵ Our campaign was supported by 1001 signatures from the online action and co-signed by the trade unions from the transport sector, firemen and building co-operative. See: <http://www.eps.cz/pro-media/tiskova-zprava/vyzva-vlade-neudelujte-bezplatne-emisni-povolenky>.
http://aa.ecn.cz/img_upload/98a9a0fe3779d35f22dc8d93fe87df89/povolenky_infosheet_0709.pdf.

a reply stating that due to the legal nature of the Government's approval of the Czech application and the National Investment Plan it is not possible to submit an appeal.

The communicant has also informed the European Commission about his concerns in relation to the Czech application, the argument about insufficient public participation and the possible impact on the environment was also raised. The critical report was sent to DG Clima on 5 December 2011.²⁶ The communicant has not received any reply to this report yet.

VII. Confidentiality

The communicant does not ask for any information contained in this communication to be kept confidential.

VIII. Supporting documentation (copies, not originals)

The communicant attach the following supporting materials and kindly ask the Compliance Committee to inform the communicant what other materials would be useful for the Compliance Committee in this case and shall be provided.

1. The Application for allocation of free emission allowances for investment into equipment and modernization of infrastructure and into clean technologies and the National Investment Plan.
2. The National Investment Plan ("NIP").
3. The Resolution of the Government of the Czech Republic on the application for allocation of free emission allowances for investment into equipment and modernization of infrastructure and into clean technologies and the National Investment Plan.

Signature

In Brno, Czech Republic,

9.5.2012

Ms. Kristína Šabová

²⁶ The critical report is available at:
http://en.eps.cz/sites/default/files/publikace/report_on_czech_10c_application_final.pdf.