



ENVIRONMENTAL LAW SERVICE

Answers to the questions of the Compliance Committee with regard to the Communication Ref. ACCC/C/2012/70

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The communicant hereby answers the questions of the Compliance Committee, which were attached to the letter of the Secretary to the Aarhus Convention Compliance Committee from 16 August 2012.

1. Please provide a copy of Annex II to the Czech Application, the “Methodical Report”, which includes the argumentation of the Party why an environmental assessment of the national plan was not required.

The complete copy of the “Methodical Report” referred to in the communication is attached in a separate attachment (see:Methodical_report_2011). Below is an unofficial translation of the relevant part.

On page 10 and 11, section C.2. *Mechanism to ensure the balance between the value of investments and the value of free emission allowances, 2.1. Please provide a description of the overall approach, the legal base and the operational details of the mechanism:* “The Ministry of the Environment also gave consideration as to whether it is necessary to carry out an environmental impact assessment of the national plan. Since the material does not fulfil the requirements for a concept within the meaning of Act No. 100/2001 Coll., it cannot be deemed to be a concept under this legislation. Neither does it meet the criteria of the framework for assessment by an authorised entity. Moreover, the material involved is a national plan of investments, which does not fall under the provisions of Act No. 100/2001 Coll., as the Act states that financial and budgetary concepts are not subject to assessment according to Section 10a(2)(c).”

Furthermore, it is important to note that an updated version of the “Methodology report” was attached to the approved version of the Czech application and the National Investment Plan. This version is available in English language and is also attached to this document (see:

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Methodology_report_2012). Below you will find relevant part with information on the environmental assessment of the National Investment Plan that is identical to the former.

On page 11, section C.2. *Mechanism to ensure the balance between the value of investments and the value of free emission allowances, 2.1. Please provide a description of the overall approach, the legal base and the operational details of the mechanism:* “The Ministry of the Environment also gave consideration as to whether it would be necessary to carry out an environmental impact assessment of the national plan. Since the material does not display the features of a concept within the meaning of Act No. 100/2001 Coll., it cannot be deemed to be a concept under this legislation. Neither does it meet the criteria of the framework for assessment by an authorised entity. Moreover, the material involved is a national plan of investments, which does not fall under the provisions of Act No. 100/2001 Coll., as the Act states that financial and budgetary concepts are not subject to assessment according to Section 10a(2)(c).”

2. Although Czech authorities did not find that the National Investment Plan qualifies as a “plan or conception” and that no environmental assessment under national legislation is applicable (p.6 of your communication), public consultations were carried out (p. 4 of your communication), as required in Annex VII to the Guidance Document of the European Commission.

Could you please explain whether the public participation would have been different, had a strategic environmental assessment or an EIA been carried out?

In case the strategic environmental assessment would have been carried out, the following requirements would have been applied and the public would have had the following opportunities to participate.

Firstly, it is important to mention that the application and the National Investment Plan would be assessed in the complex process and such assessment shall include “the identification, description and evaluation of expected direct and indirect impacts of implementing or not implementing the conception and its objectives for the whole period of its expected implementation”¹.

Furthermore, in the assessment, measures to prevent unfavourable impacts on the environment and public health, to exclude, reduce, mitigate or compensate these impacts, or, if appropriate, to increase the favourable impacts on the environment and public health by implementing the conception shall be proposed and assessed, including an evaluation of the expected effectiveness of the proposed measures².

This assessment would be released for the public for a review. This aspect plays also an important part in informing the public and could be perceived as the necessary information pursuant to Article 7 of the Aarhus Convention³.

¹ Article 10b, para. 1 of the Act No. 100/2001 Coll. on Environmental Impact Assessment and Amending Some Related Acts. (hereinafter the EIA Act).

² Article 10b, para. 4 of the EIA Act.

³ The provision of Article 7 is linked to Article 5, para. 7 (a), which obliges Parties to publish the facts and analyses contributing to major environmental policy proposals.

Pursuant to Article 10c of the EIA Act a conception shall be notified and the relevant authority shall send a copy to the affected administrative authorities and to the affected territorial self-governing units which shall publish it further. The notification shall be also published on the internet and at this point, every person may send his/her written viewpoint on the notification of a conception to the relevant authority within 20 days of the date of publication thereof.⁴

The next stage is a fact-finding procedure pursuant to Article 10d of the EIA Act. In the conclusion of the fact-finding procedure, the relevant authority shall propose the procedure of assessing the conception including the holding of a public hearing. Afterwards, the evaluation that is an integral part of the draft conception would be prepared and the draft conception would be published on the internet together with the information on when and where it may be reviewed.

In this particular case, the relevant authority would be the Ministry of Environment pursuant to Article 10j of the EIA Act. Every person might send his/her written viewpoints on the draft conception to the Ministry within 30 days of the date of its publishing. The Ministry would review and evaluate all viewpoints received in the due period together with the comments from the public hearing. On their basis it would issue the statement on the draft conception⁵.

With regard to the public hearing, information about the time and date of the public hearing on the draft conception has to be published at least 10 days prior to taking place.⁶ The public hearing cannot take place earlier than 30 days after the submission of the draft conception to the relevant authority with aim to allow the public to learn about the public hearing.⁷ In addition, every person may send his/her written viewpoint on the draft conception and the related documentation to the relevant authority within 5 days after the public hearing on the draft conception took place⁸.

To summarise, in case the SEA procedure pursuant to EIA Act would have been carried out, the public would have the opportunity to review the proposed materials and to comment on them within the reasonable timeframes and also to participate in the public hearing where it could express their viewpoints and raise questions about the documentation and the draft conception. In addition, the assessment of the conception with regard to the identification, description and evaluation of expected direct and indirect impacts of implementing or not implementing the conception and its objectives for the whole period of its expected implementation would have been prepared and without doubt it would also contribute both to the quality of the documents and the better understanding of the conception. To this end, it would allow the public to contribute in a more sophisticated way.

3. You claim that the Application and plan are final under Czech law (p.3 of your communication).

At the same time, it is understood that the Czech authorities have submitted their Application, accompanied by the national investment plan, to the European Commission in order to qualify for an exception under the revised rules of the EU Emission Trading System. This means that there is a possibility that the European Commission rejects the Application or returns the Application to the

⁴ Article 10c, para. 3 of the EIA Act.

⁵ Article 10j, para. 3 of the EIA Act.

⁶ Article 10f, para. 3 of the EIA Act.

⁷ Article 10f, para. 4 of the EIA Act.

⁸ Article 10f, para. 5 of the EIA Act.

Czech authorities for revision, on the ground that the public participation process (as described in Section 6 at p.17 of the Application) applied by the Czech authorities was not in conformity with the public participation standards under EU law.

Could you please elaborate how the Application and the Plan are final, if there is still a possibility that the European Commission requests the Czech authorities to revise the process and the Application, especially with respect to the consultation process?

According to the EU ETS Directive⁹, the Member States wishing to apply for the derogation were under the duty to submit an application to the European Commission by 30 September 2011. The next step foreseen by the Directive is the assessment of the Commission that shall be carried out within the 6 months after the receipt of the relevant information. The Directive states that the Commission shall reject the application or any of its parts if it does not comply with the requirements laid down by it. There are clearly set deadlines for the actions of the Member state applying for the derogation and also for the actions of the Commission.

From the moment when the application is submitted, the Commission can request the relevant information and reject the application in whole or any of its parts. With regard to the potential consultations and amendments there was opportunity to do so before the submission of the documents to the Commission.

In addition, the Czech ETS Act No. 695/2004 Coll.¹⁰ in Article 10a stipulates that the Ministry of Environment invites up to 31 October 2009 electricity producers to submit the necessary documents for the processing of the application and the electricity producers have to submit these documents on 30 June 2010 at the latest. On the basis of the documents it receives, the Ministry will prepare an application for the allocation of free allowances¹¹. From the above mentioned provisions it is clear that the group of the electricity producers is specified in sense that those wishing to apply had to submit their documents until 30 June 2010. It is also clear that the framework for the preparation of the application was firmly fixed in the valid legislation.

The Czech ETS Act also specifies that the Ministry of Environment submits an application by 30 November 2010 to the Government and publishes it in a manner that allows a remote access. The Government shall immediately after the approval of the application submit the application to the European Commission for its assessment. Thus, the approval of the Government is a final act on the national level and afterwards there is only the assessment from the Commission that might end in the refusal of the application in part or as a whole. In our opinion there is no legal basis for to allow

⁹ 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. as amended by 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.

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

¹¹ The Article 10a is translated in the Methodology report 2012 attached to this document on p.46 with emphasis added.

the Czech authorities to make significant changes¹² in the documents during several months after its approval by the Czech Government.

ELS statement about the final content of the application and the National Investment Plan was also derived from the fact that if the public participation shall have any relevance in the whole process, the documents released to the public have to be in the final form thoroughly prepared by the Czech authorities. Otherwise, it would not make sense to run a public consultation if it is foreseen that the documents will undergo the substantial review and changes. In fact, the public process in the Czech Republic was closed when the public consultation was concluded and the Government approved the application and the National Investment Plan.

However, from the released communication between the Czech Republic and the European Commission it is clear that the National Investment Plan underwent more changes from the December 2011 until its approval in July 2012. Commission decision C(2012) 4576 of 6.7.2012 concerning the application pursuant to Article 10c (5) of Directive 2003/87/EC of the European Parliament and of the Council to give transitional free allocation for the modernisation of electricity generation notified by the Czech Republic (hereinafter the Commission Decision C(2012) 4576) states that “the Czech Republic submitted additional information in order to complete the notified plan by letter dated 16 January 2012 in reply to questions from the Commission, and by letter of 21 June 2012, registered on 26 June 2012”.¹³

A letter from the Czech Ministry of Environment dated 21 June 2012 goes further into details stating that the Czech republic has officially resubmitted its application for derogation pursuant Article 10c of the Directive 2009/29/EC on 12 June 2012. Further it states that “in the light of consultation with the Commission, which took place after the resubmission, I would hereby like to replace the resubmitted documents with the ones in the attachment. Please consider them as a final version of our application for derogation.”¹⁴ To conclude, the Czech Republic has resubmitted the application on 12 June 2012 and also on 21 June 2012.

ELS would like to point out that the abovementioned letter includes the Annex specifying the changes in the application and the related document. It concludes that apart from minor corrections of technical nature, the following main changes have been made in the application: determination of market value of allowances, eligibility of installations, legislation and the question of decommissioning and back-up. However, there is no mention about the changes in the National Investment Plan although these undoubtedly took place and had impact on the content of the National Investment Plan.¹⁵

¹² Such as changes in the total number of allocations and new investments added into the list.

¹³ Point 3 of the Commission decision of 6.7.2012 concerning the application pursuant to Article 10c (5) of Directive 2003/87/EC of the European Parliament and of the Council to give transitional free allocation for the modernisation of electricity generation notified by the Czech Republic, C(2012) 4576.

¹⁴ Letter from Mr. Ivo Hlaváč, Ministry of the Environment of the Czech Republic to Mr. Jos Delbeke, DG Climate Action, European Commission, 21 June 2012, Ref.:51549/ENV/12, 1240/770/12. Attached to this replies as Cover letter_2nd resubmission.pdf.

¹⁵ It is obvious from the brief analysis of the approved version of the National Investments Plan that some investments were removed, the new ones were added and some were modified. Unfortunately, due to the lack of information about the

The fact that more changes to the application and the National Investment Plan were made throughout the assessment process, undermines the importance and relevance of public consultation carried out in August 2011. It is highly questionable what impact could the comments from the public have, if they were aimed at the version of the documents that were later on two times resubmitted.

In addition, the Commission did not require the Czech authorities to revise the process of public consultation and more importantly, the Commission has approved the Czech application and the National Investment Plan without the sufficient public participation process undertaken. The process on the European level did not have any influence on the public process of preparation and adoption of the documents in the Czech Republic.

4. On pp.9-10 of your communication, you allege that the Czech authorities claimed that “it was not possible to submit an appeal” against the Government's approval of the Application or the National Investment Plan. Would this also imply non-compliance with Article 9 of the Convention?

Firstly, with regard to the Communication Ref. ACCC/C/2012/70, section VI. Use of domestic remedies or other international procedures, ELS would like to supplement the following information and provide an update of the actions taken between the submission of the Communication and this reply to the questions of the Compliance Committee.

On 20 August 2012 ELS brought an action to the court on the basis of exhaustion of all possible remedies and the ineffective measure against inactivity of the Prime Minister¹⁶. The action calls for the court to oblige the authority to act, specifically, to require the Prime Minister to issue a decision on the appeal from 14 October 2011.

Secondly, with regard to the possible non-compliance with Article 9 of the Aarhus Convention, ELS notes that in general, the question of the possible legal challenge to the decisions of the Government is very complex. Within its Communication and for further proceeding, ELS would like to limit its allegations to the question of public participation under Article 7 in conjunction with provisions of Article 6 as provided in the Communication Ref. ACCC/C/2012/70.

5. You state that you informed the European Commission about your concerns on 5 December 2011. Has the European Commission acknowledged that it received your information?

Has the European Commission approved the Czech application and the National Investment Plan yet or is it still considering the documents?

investments and the transparency in general, it is not possible to make clear statement on how many changes took place in reality.

¹⁶ Submitted on the 20 January 2012 and replied to by a letter from the Office of the Government dated 28 February 2012, in relation to which it is important to note that the letter itself cannot be seen as a formal decision in the legal sense.

The European Commission has not formally acknowledged the receipt of our report sent via email on 5 December 2011, however the information provided in the report and the report itself were discussed during the meeting with the representatives of DG Clima on 19 January 2012.

On 6 July 2012 the Czech application and the National Investment Plan were approved by the European Commission by the Commission decision C(2012) 4576.¹⁷

With regard to the Commission decision C(2012) 4576, on 16 August 2012 ELS submitted a request for an internal review of the Commission decision C(2012) 4576 and has been acknowledged about the receipt of the request on 10 September 2012. In the request it is argued that the decision failed to comply with the requirements of the SEA Directive¹⁸ and that the environmental assessment of the Czech application and the National Investment Plan is required under the valid EU environmental legislation. Apart from the missing SEA procedure, the lack of compliance with the provisions of the Aarhus Convention was mentioned with regard to the lack of public participation in the process.

Nevertheless, the request for internal review is focused on the failure of the European Commission to comply with the relevant EU environmental law and with regard to the concluded process in the Czech republic that is in our main focus it does not have an influence on it.

In Brno, on 29 October 2012.

¹⁷See:http://ec.europa.eu/clima/policies/ets/auctioning/derogation/docs/comm_dec_2012_4576_en.pdf.
Further information on: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/531> and
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/530>.

¹⁸Directive 2001/42/EC, on the assessment of the effects of certain plans and programmes on the environment.