



ENVIRONMENTAL LAW SERVICE

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Summary of the Communicant's arguments in the public hearing during the Fortieth meeting of the Compliance Committee

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With regard to the issues raised and discussed during the public session held during the Fortieth meeting of the Aarhus Convention Compliance Committee, the Communicant hereby provides his comments with aim to provide the further clarification of the issue in question to the Compliance Committee.

1. The National Investment Plan was prepared by the Czech Republic and during the process of the preparation, the public participation pursuant to Article 7 of the Aarhus Convention was not ensured

Firstly, the option to apply for the transitional free allocation of the emission allowances was given to eligible Member States, with the Czech Republic among them. In order to use the option, the Czech Republic had to prepare the Application and the National Investment Plan. This was the duty of the Member State that wished to apply for this option.

Secondly, the Czech Republic was the only authority responsible for the decision whether to use this option or not, whether to apply for this option or not. When it decided to use this option, the further decisions of the Czech Republic on the following issues were necessary:

- for how long and in what extend the Czech Republic wishes to use this option.
- what methodology for the calculation of allocations will the Czech Republic apply
- what kind of investments will be proposed for the National Investment Plan
- the monitoring and enforcement provisions with regard to the proposed investments, etc.

Pursuant to the Treaty on the functioning of the EU, the question of the preferred energy sources, the choice between different energy sources and the general structure of the energy supply is a right of a Member State's to determine (Article 194). It follows that it was primarily a Czech Republic's discretion to decide what

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kind of plan or strategy the National Investment Plan presents and what kind of change will be achieved by its implementation.

During the public session, the Party concerned presented an opinion that the decision on applying this option was already taken in 2009 when the Czech Parliament adopted an amendment to the Act on emission trading 695/2004 Coll. and that the approval by the Czech Government in September 2011 was just a formality.

In the Communicant's view this opinion is not plausible and does not allow the Czech Republic to depart from its duty under Article 7 of the Aarhus Convention, i.e. that it should have ensured the public participation during the preparation of the National Investment Plan for the following reasons.

The amendment of the Czech Act on emission trading 695/2004 Coll. introducing new Article 10a establishes a framework for the potential future use of the transitional free allocations. There are duties of the Ministry laid down and the procedure of the preparation of the documents – Application and the National Investment Plan is foreseen.

It is clear that the Ministry of Environment prepared the Application and the National Investment Plan and submitted it to the Government. Subsequently, it was the duty of the Government to decide whether to approve the documents and in case of an approval, to send them to the European Commission. In case the Czech Government would not have approved the Application and the National Investment Plan, it could not have been submitted to the European Commission and the Czech Republic could not use the option of the transitional free allocation.

Pursuant to Article 10a of the Czech Act on emission trading 695/2004 Coll, para.4 *“On the basis of the received information, the Ministry prepares the Application for the free allowances in a manner allowing for the maximum use of free allowances for the investments to the equipment and modernization of the infrastructure and clean technologies. The application contains the proposal for the allocation methodology and particular allocations. The Ministry submits the Application before 30 November 2010 for approval of the Government and publishes it in a manner allowing for a remote access. The Government after the approval submits the Application it to the European Commission”*.

This conclusion is also stated in the press release from 22 September 2011 of the Ministry of Environment - The Government unanimously approves the application for emission allowances, *„However, 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 – corresponding to a maximum of 108 million (17 %) – 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. Yesterday the Government decided to exploit this possibility.”*¹

¹ Available at: http://www.mzp.cz/en/news_110922_emission_allowances.

2. The comments provided during the public consultation in August 2011 were not taken into account during the decision-making process of the Application and the National Investment Plan. The follow-up communication with the European Commission could not have an impact on the process of the public participation in the Czech Republic

With regard to the Communicant's comments and their consideration by the Czech Republic, the Communicant wishes to provide the summary of these comments. The whole document was prepared only in the Czech language and the only authorities concerned were those of the Czech Republic. Due to the nature and the content of these comments, the European Commission, or any other authority except that of the Czech Republic, could not consider and take them into account during the preparation of the plan.

The Communicant wishes to highlight that his subsequent communication with the European Commission concerned the issues of compliance of the Application and the National Investment Plan with the European legal framework. Thus, at the time of the assessment of the Czech documents by the European Commission, the concerns and comments from the Communicant could not be fully taken into account.

For illustration, the comments from the Communicant provided in August 2011 during the consultation period contained the following information:

I. Electricity operators in the Czech Republic do not need the free allowances, the state can use the 47,5 billion in a different way – the Communicant together with other NGOs argued, that it is up to the Member state applying to decide whether and in what extent it applies for the derogation. In addition, that it is mainly a question of the priorities whether the Government decides to give priority to the electricity generators or decides to auction the allowances and the gained resources uses for other purposes. The NGOs suggested the Government not submit the Application to the European Commission due to the following reasons:

- 1. The state budget will lose billions that could be used for the modernization of the economy and the support of the reduction of the emissions,*
- 2. The electricity generators do not need free allowances, they have a surplus of them,*
- 3. More free allowances will cause further problems in the EU emission trading system,*
- 4. The chosen allocation method is advantageous for the inefficient producers, i.e. it is more favourable for those who have not invested in the modernization in the past and produce more emissions,*
- 5. The Application does not provide evidence that the principles laid down in the Commission Guidance are complied with.*

II. The comments on the process of the adoption of the Application

- 1. No environmental assessment was carried out for the Application and the National Investment Plan (the NGOs argued that the strategic environmental assessment should have been carried out and a failure to conduct an SEA assessment was in breach of the SEA Directive and the Aarhus Convention).*

2. Insufficient release of the Application – on the Ministry of Environment website the Application was posted, however this fact was not announced in any other way and it was not clearly accessible from the homepage of the Ministry and it was rather difficult to learn that there is such on-going process.

With regard to the content, the Ministry has published the Application without the essential part – the National Investment Plan. Therefore, the public could not comment on the Application with the necessary knowledge of what investments will be used for the exchange of the value of free allowances.

The Communicant wishes to highlight that with regard to these comments brought to the Ministry of Environment in August 2011, no changes were made to the Application or the National Investment Plan and that these comments were not taken into consideration during preparatory and decision-making process in the Czech Republic at all.

The Communicant's reports to the European Commission

In the reports prepared for the European Commission, the Communicant provided an analysis of the key flaws which make the Czech application and the National Investment Plan incompatible with relevant provisions of EU law and brought this information to the Commission's attention. The provided information and call to the Commission is focused on the authority and competence of the European Commission to ensure the compliance with the European legislation during its assessment of the Czech Application and the National Investment Plan. In this regard, there was no formal public participation process opened.

With regard to the subsequent changes made to the National Investment Plan during the period between the approval by the Czech Government and submission of the documents to the European Commission and the final approval by the Commission, these changes have no connection to the public consultation held during the one week in the Czech Republic and the comments provided at that time. Also the public was not informed about any changes made during the adoption process.

Furthermore, the Communicant wishes to stress that the only way how to provide the comments on the decision to apply for the derogation itself and the relevance of the derogation in the Czech Republic was only within the Czech Republic. The Commission does not have the capacity to reject the decision of the Member State that was eligible under Article 10c of the EU ETS Directive and that complied with all requirements laid down in the relevant legislation.

In general, the assessment process on the European level did not have an impact on the process of the preparation of the Application and the National Investment Plan, neither it has any influence on the public participation process.

The Communicant is persuaded that with regard to the requirements of the Aarhus Convention for the early and effective public participation during the preparation of the plans/programs, the only way how to ensure

it, was within the Czech Republic and before the approval of the Application and the National Investment Plan by the Czech Government.

3. Outstanding question when was the National Investment Plan published

With regard to the question when the Ministry of Environment had actually released the National Investment Plan, the Communicant provides translation of the information from the website of the Ministry of Environment calling for the public comments.

Application for free allocation of allowances for the electricity generation in years 2013-2019 and the preliminary allocation²

*Pursuant to Article 10c of Directive 2009/29/ES the Ministry of Environment has prepared an application for the free allocation of allowances for the electricity generation under the condition that the value of the free allowances will be invested by the electricity generators into equipment and modernization of the infrastructure and clean technologies. The application shall be submitted to the European Union until 30 September 2011. Ministry of Environment thus releases **the application and the preliminary allocation**³ for the public comments. The comments can be sent until Friday 26 August 2011 to the emission.trading@mzp.cz.*

*Documents for downloading: The Application
Preliminary allocation
Investments*

From the experience of the Communicant the document "Investment" was posted after the public consultation was closed. Furthermore, the Communicant notes, that the document „Investments“, that was later posted on the abovementioned website is not in the form of the Template provided by the European Commission and that the information on the type of the investment, anticipated date of realisation, expected emission reductions, compliance with the principles laid down in the Guidance document from the Commission is not provided.

There is only information on the operator and the description of the project.⁴ It is possible to compare the level of detail and quality of the provided information by review of the documents "Investments"⁵ and the Annex 2 "NIP" document attached to the Communication.

In addition, the Application released for the consultation, in section 6. Transparency and public consultation (the English translation was provided to the Committee as Annex 1 to the Communication) contains the following information, "***In the course of preparation of the National Investment Plan of the Czech Republic, the Ministry of the Environment has cooperated on a professional level with the Minister for Industry and Commerce, Ministry of Finance as well as with representatives of the energy industry.***"

² <http://www.mzp.cz/cz/derogace>, Informal translation done by the Communicant.

³ The Communicant highlights that the Ministry did not note the National Investment Plan in this notice and that from the personal experience of the Communicant, the National Investment Plan was not released before 26 August.

⁴ See: [http://www.mzp.cz/C1257458002F0DC7/cz/derogace/\\$FILE/ozk-investice_10c-20110825.pdf](http://www.mzp.cz/C1257458002F0DC7/cz/derogace/$FILE/ozk-investice_10c-20110825.pdf).

⁵ Available at [http://www.mzp.cz/C1257458002F0DC7/cz/derogace/\\$FILE/ozk-investice_10c-20110825.pdf](http://www.mzp.cz/C1257458002F0DC7/cz/derogace/$FILE/ozk-investice_10c-20110825.pdf)

The National Investment Plan of the Czech Republic takes into account the Commission's Guidance plan, will be subject to interdepartmental amendment procedure and will be subsequently published on the website of the Ministry for the Environment in order to enable the public to submit their comments. The Ministry of the Environment will thoroughly settle all duly submitted comments." (Emphasis added by the Communicant).

4. Conclusion

In the present case it is obvious that during the whole process, the competence was divided between the State applying for the derogation and the European Union. In general, both authorities have the obligation to ensure the compliance with the Aarhus Convention as they are both parties to the Convention.

Nevertheless, taking into consideration that the Aarhus Convention requires the participation in early stages of the decision-making when all options are opened and it is possible to effectively influence the content of the plan or programme and with regard to the issues that could be, in the present case, decided only within the Czech Republic (Member State applying), it was in the Communicant's view the primary duty of the Czech Republic to ensure the compliance with the Article 7 of the Aarhus Convention. Needless to say, that the position of the Czech Republic during the preparation and adoption of the Application and the National Investment Plan was essential and very specific.

In Brno, 2 May 2013

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