



ENVIRONMENTAL LAW SERVICE

Comments to the answers provided by the Czech Republic to the questions from the Compliance Committee with regard to the Communication Ref. ACCC/C/2012/70

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The communicant would like to provide the comments to the answers submitted by the Party concerned as sent to the Communicant on 16 January 2013.

Firstly, the Communicant is convinced that it is essential to draw a line between the competence and the duties of the Czech Republic and the European Commission with regard to the preparation and approval of the application and the NIP, and the public participation process thereof.

Secondly, the Communicant provides his comments on the particular allegations from the answers of the Party.

Lastly, the Communicant wishes to inform the Compliance Committee about the updates in his other actions concerning the derogation of the Czech Republic under Article 10c of the Directive 2003/87/EC.

1. The duty of the Czech Republic with regard to the public participation process

The Czech Republic in its replies highlights the role and position of the European Commission as the responsible decision maker in the present issue.

The Communicant notes that the final decision on the approval of the Czech application and the NIP was taken by the European Commission, nevertheless, the Czech Republic was the authority responsible for the preparation of the application and the NIP.

First, the option to derogate from the general rule to auction the emission allowances pursuant to Article 10c of the Directive 2003/87/EC was opened for the particular Member States that could decide whether

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they wish to use this option. The Directive 2003/87/EC provides a legal framework for the derogation, however it is within the discretion of the Member State to decide whether to use it or not. The Czech Republic was not obliged to apply for this option and could auction the allowances pursuant to the general rules.

Second and more importantly, it was the decision of the Member State on the extent and way how to use this option. Specifically, the decision making of the Member State is directly reflected in the content of its application and the NIP. It was the role of the Member State to decide on how to prepare the application and the NIP.

For instance, the Member State had discretion in question of the allocation methodology to be used. Further, on the national level it was necessary to decide for how many years and to what extent the Member State wants to make use of the derogation¹. Also with regard to the number of the allowances that could be allocated for free, the Member State could decide to distribute fewer emission allowances than is the maximum amount permitted.

The Member State was also responsible for the selection and approval of the investments in the NIP and the assessment whether they comply with the requirements set forth by Article 10c of the Directive 2003/87/EC and the principles laid down in the Guidance².

The issues brought by the NGOs to the attention of the Czech authorities during the public consultation in August 2011 concerned, among other, the above mentioned questions that were in the exclusive capacity of the Czech republic – the question of purpose and questionable benefits of applying for the derogation, the choice of the allocation methodology, and the selection and the quality of the investments proposed for the NIP.

Furthermore, the Communicant wishes to stress that the only way how to provide the comments on the decision to apply for the derogation and the purpose of the derogation in the Czech Republic was on the national level. The Commission does not have the capacity to reject the decision of the Member State that was eligible under Article 10c and that complied with all requirements laid down in the relevant legislation. The appropriate forum where this issue could be raised and decided was within the Czech Republic. With regard to the timeframe, it is obvious that it was possible only prior to the approval of the Government.

¹ See: http://ec.europa.eu/clima/policies/ets/cap/auctioning/derogation_faq_en.htm, FAQ: 6. *If an eligible Member State wants to make use of the derogation, what must it do and by when?* The Member State needs 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 regard. It must submit an application to the European Commission by 30 September 2011. Member States applying for the derogation need to take into account that the number of free allowances to be given to the power sector reduces the number of allowances they can sell at auction, thus lowering their national auctioning revenues.

Further, The European Commission states only the maximum period for which the derogation can be authorised (from 1 January 2013 to 31 December 2019) and the Member State can decide to apply for a shorter period.

² COMMUNICATION FROM THE COMMISSION, Guidance document on the optional application of Article 10c of Directive 2003/87/EC (2011/C 99/03).

Therefore, the Communicant is convinced that the Czech Republic could not depart from its responsibility for the public participation to the European level and the decision-making of the European Commission.

2. Communicant's comments on the replies of the Czech Republic

Question 1. *The communicant provides information about public consultations carried out for the Application and the NIP (p.4 of the C.). Is there a national Framework for the conduct of public consultations, as required by the EU, in cases other than the EIA and SEA processes (which in your view were not applicable in the present case) If yes, please provide an English translation of this framework/rules to the Committee.*

Czech Republic

„Ministry fulfilled both national legislation and EU guidance requirements by posting the application on the Ministry web site on the 19th August 2011. As stated above, there is no EU or national requirement for a formal public consultation of the application. Both the Commission guidance and the national legislation require a mere publishing of the application. In addition to that, neither the Guidance nor national legislation requires publishing before the approval by the national authority. On the contrary paragraph 60 of the Guidance states that the Member state should publish the application before submitting it to the Commission to enable the Commission to consider information and views from other sources. We believe that such wording implies a public consultation carried out on the EU level, not on the national level. Public is meant to send relevant comments and views straight to the Commission which takes them into accounts and deals with them.

*The main reason for such procedure is that the final decision on the Application and the National Investment Plan is taken by the Commission, not by the Member state. **The Member state merely submits its Application, accompanied by the National Investment Plan, to the Commission in order to apply for the exception under the revised rules of the EU Emission Trading System. Nevertheless, the directive gives the decision-making power over the Application to the Commission.** (emphasis added by the Communicant)*

...

Beyond requirements of the Guidance and of the national legislation, the Ministry enabled a public consultation on the national level before the Government approval of the Application, by publishing the Application together with a call for comments.“

Communicant

With regard to the Czech Republic's allegations of compliance with the national and European legislation, the Communicant notices that for the review and assessment of the Compliance

Committee, the relevant fact is, whether the process complied with the requirements of Article 7 in conjunction with the relevant provisions of Article 6 of the Aarhus Convention.

The compliance with the national and/or European legislation is definitely an important issue that may provide useful background and supportive arguments for the review process. However, even in case the compliance with the national/EU legislation is confirmed, this fact does not ensure that the Czech Republic complied with the provisions of the Aarhus Convention.

In the Communicant's view, the Czech Republic in its response does not respond to the primary claim of the Communicant that the process in question failed to comply with the relevant provisions of the Aarhus Convention.

Question 2. Please explain whether the period of one week from 19 to 26 August 2011 constitutes „reasonable time frames“ for effective public participation.

Czech Republic

“The Guidance presumes that public will send relevant comments and its views straight to the Commission, not to the Member states. The main reason for such procedure is, as stated above, that the actual and final decision on the National Investment Plan is taken by the Commission, not by the Member state.

The Ministry published the application on the 19th August 2011, more than one month before submitting it to the Commission. Since that time on, the Application has been on display on the web site of the Ministry and public has had access to it and has had opportunity to forward its comments, views and relevant information to the decision-taking body, which is the Commission.

In addition to that, the Ministry enabled, beyond requirements of the Guidance and of the national legislation, a public consultation before submitting the Application for approval to the government. The comments received during the public consultation period were taken into account when drawing the final version of the Application which was then submitted to the Government for approval before sending the application to the Commission.

We believe that the actual time frame for public consultation was not limited to one week (from 19 to 26 August). As stated above the public had possibility to forward its comments to the Commission from 19th August on, which in our opinion constitutes a reasonable time frame. However only the comments sent to the Ministry of Environment in the period from 19th to 26th August were considered when drawing the final version of Application for Government approval. Nevertheless, the decision-making body is the Commission, so the comments submitted to the Commission itself play the essential role (here the time frame wasn't limited at all).”

Communicant

With regard to the time frame provided for the comments and public participation, the Communicant does not agree with the opinion presented by the Czech Republic. In particular, with the claim that *“We believe that the actual time frame for public consultation was not limited to one week (from 19 to 26 August). As stated above the public had possibility to forward its comments to the Commission from 19th August on, which in our opinion constitutes a reasonable time frame. However only the comments sent to the Ministry of Environment in the period from 19th to 26th August were considered when drawing the final version of Application for Government approval. Nevertheless, the decision-making body is the Commission, so the comments submitted to the Commission itself play the essential role (here the time frame wasn’t limited at all).”*

With regard to the Communicant’s general comment (under 1.The duty of the Czech Republic with regard to the public participation process), the Communicant is persuaded that the effective participation in the process was possible only on the national level. It follows, that the sufficient timeframe has to be assessed primarily in relation to this process within the Czech Republic.

Further, in the Communicant’s view, the Czech Republic contradicts itself in stating that the time frame was not limited to the one week and at the same time presenting, that only the comments sent during the week 19th to 26th August were taken in the consideration when preparing the final version of the Application and the NIP. Obviously, the comments submitted in one or another part of the process could not be of the same relevance and having the same objectives and potential results. It follows, that the public consultation in the Czech Republic was in fact limited to the one week period and after 26 August it was closed.

Moreover, the only information that was released on the website of the Ministry of environment of the Czech Republic states: *“It is possible to send the comments to emission.trading@mzp.cz until Friday 26 August 2011.”*³ The Czech Republic did not provide any further information about the public consultation on the European level on its website, no information of this kind was available to the public and according to all available evidence neither European Commission was of the opinion that the comments and views on materials prepared for the approval of the Czech Government have to be submitted to its services.

³ See: <http://mzp.cz/cz/derogace>.

Question 3. Please provide information on how many comments the Czech authorities received after the end of the consultation period? And how these comments were taken into account? (if possible, substantiate your answer with the relevant documentation/tables recording all comments received and whether/how they were considered).

Czech Republic:

„Ministry received comments from several subjects, ..., and NGOs (Environmental Law Service together with Friends of the Earth Czech Republic, Centre for Transport and Energy, Greenpeace and Green Circle).“

Regarding the comments of the public (concerning mostly technical issues and practical questions), these were mostly dealt with by means of an explanation (sent in an email or in a letter depending on the way the respected comment was received).“

Communicant

With regard to the information provided by the Czech Republic stated above, the Communicant would like to provide the following comment.

The comments from the NGOs were sent via email from Ms.Barbora Hanžlová on behalf of the Centre for Transport and Energy, Green Circle, Greenpeace, Friends of the Earth Czech Republic and Environmental Law Service on 26 August 2011. The Ministry of Environment of the Czech Republic did not reply to Ms. Barbora Hanžlová acknowledging the receipt of the comments, neither it provided any explanations or information with regard to the comments and their consideration afterwards the decision of the Czech Government was taken or after the submission of the documents to the European Commission.

To conclude, no information was received as a follow-up of the NGOs comments neither sent by an email or by any other form as provided by the response of the Czech Republic. According to all available evidence and the personal experience of the Communicant, information provided by the Czech Republic is not correct.

Question 4. In its attempts to appeal the Governments approval of the Application/Plan, the communicant received a response that due to its legal nature, this was not subject to appeal. Could you please elaborate on this matter, referring to the applicable legislation?

With regard to the fourth question, the Communicant refers to his replies to the questions of the Compliance Committee sent on 29 October 2012, in particular, that for the review of the Compliance Committee and for the further proceedings, the Communicant wishes to limit the review of the Compliance Committee to the question of the public participation under Article 7 in conjunction with provisions of Article 6 of the Aarhus Convention.

Question 5. Has the European Commission considered the Czech application and the National Investment Plan yet? Was there any request from the European Commission yet?

Czech Republic:

“However, there is another process ongoing, which considers the application from the view of competition. The Commission, DG Competition hasn’t issued its decision in this regard yet. After the final decision of the Commission is received, the approved application will be published.”

Communicant

With regard to the assessment process within the DG Competition, the decision on the Czech application was taken on 19 December 2012.⁴

3. Additional information from the Communicant

For the reasons of complete information provided to the Compliance Committee, the Communicant would like to inform the Compliance Committee about the recent update.

As already mentioned in his replies to the questions of the Compliance Committee sent on 29 October 2012, in August 2012 the Communicant submitted the request for internal review to the European Commission. The request was rejected by the European Commission on formal grounds as the Commission Decision on transitional free allowances, in the view of the Commission, does not fall under the definition of an administrative act as laid down in the Aarhus Regulation⁵. Subsequently, the Communicant has brought an action to the General Court on the basis of the rejected request for internal review.

The Communicant would like to stress that both actions – request for internal review as well as the action to the General Court, concerns the failure of the European Commission to comply with the relevant European legislation. Therefore, the Communicant is of the opinion that these actions do not have the impact on the present communication and its assessment.

In Brno, on 4 March 2013

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⁴ See: http://europa.eu/rapid/press-release_IP-12-1411_en.htm,
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33537.

⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.