



ENVIRONMENTAL LAW SERVICE



**OPTIONAL DEROGATION: TRANSITIONAL FREE ALLOWANCES FOR POWER
GENERATORS IN THE CZECH REPUBLIC**

Analysis by the Environmental Law Service and the Centre for Transport and Energy

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1. EXECUTIVE SUMMARY

This paper explains Czech environmental NGOs' key concerns about the Application for the transitional free allocation to the electricity sector (Article 10c of Directive 2003/ 87/ EC¹, hereinafter referred to as EU ETS Directive) and the accompanying National Investment Plan (hereinafter referred to as NIP) as notified to the European Commission by the Czech government².

The aim of this document is to provide an analysis of key flaws which make the Czech application and the NIP incompatible with relevant provisions of EU law and to bring these facts to the Commission's attention.

First, analysis of the process of preparation, public consultation and adoption of the application and the NIP is provided, concluding that the Czech Republic failed to correctly implement its obligations under the Directive 2001/ 42/ EC³, hereinafter referred to as the SEA Directive.

A further assessment of the legal provisions for implementing Article 10c is then provided, revealing that insufficient monitoring and enforcement provisions with respect to the implementation of the NIP have been established.

Second, arguments are provided to a significant extent that the NIP is in breach of the objectives of the EU ETS Directive, while containing:

- ⤴ Ineligible investments due to the commencement of the investment process before 25 June 2009
- ⤴ 46 percent of investments that will contribute to Czech dependency on coal; at least one project that will increase the coal consumption of a particular installation
- ⤴ About 85 percent of investment projects that will go to the modernisation of equipment for the production of heat
- ⤴ Cost-inefficient investments with "greening" ranges from 12 EUR/ton CO₂ to the astronomical (and barely credible) 232 000 EUR/ton
- ⤴ Investments that will cumulatively strengthen the dominant domestic power producer ČEZ a.s. in the market

A list of ineligible investment projects, a list of the least cost-efficient investments and examples from Czech media reports are provided in separate annexes.

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.

² In Czech "Národní plán investic do modernizace infrastruktury a do čistých technologií v energetice" http://mzp.cz/cz/news_110922_derogace.

³ 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.

2. INTRODUCTION

Objective and rationale for the application of Article 10c of the Directive 2009/29/EC⁴ in the Czech Republic

The EU Emissions Trading System established by the EU ETS Directive is the cornerstone of the EU's strategy for fighting climate change. Its aim, as laid down in Article 1⁵, is to help EU member states achieve their commitments to limit or reduce greenhouse gas emissions in a cost-effective way.

Directive 2009/29/EC brings substantial changes in the EU Emissions Trading System. A new provision sets the obligatory auctioning of the allowances for the power sector within the revised community scheme from 2013⁶. Auctioning as a default method of allocating emission allowances is anticipated to be the simplest, and generally is considered to be the most economically efficient system of allocation, and it should operate with the highest possible degree of economic efficiency⁷. Besides, auctioning is supposed to create the greatest incentive for investments in a low-carbon economy, thus helping to achieve the EU climate objectives⁸.

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 allowances to power generators for a transitional period until 2019.

Due to reasonable concerns that derogation will undermine the common objective and means of the EU ETS, and with the aim to ensure that the implementation of Article 10c does not impair the general rules and objectives of the EU ETS Directive, the Commission has considered it necessary to provide guidance on the implementation of this article,⁹ including establishing rules and principles for the application form, as well as requirements set up for national plans.

It is the Commission's duty to assess individual applications by the member states wishing to apply Article 10c. Those states that do apply the option must comply with the provisions of Article 10c of the EU ETS Directive and should follow the guidance given by Commission. Needless to say, the member states are obliged to comply with the *acquis communautaire*.

The assessment by the Commission will particularly concern: the list of installations eligible to receive free emission allowances and the number of allowances to be allocated to each; the national plan listing the investments to be undertaken; the monitoring and enforcement provisions a member state has to put in place

⁴ DIRECTIVE 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending the EU ETS Directive so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, hereinafter referred to as Directive 2009/29/EC.

⁵ Article 1: This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

⁶ 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.

⁷ Recital 15, Directive 2009/29/EC: Auctioning should therefore be the basic principle for allocation, as it is the simplest, and generally considered to be the most economically efficient, system.

⁸ Formulated, for example, in COMMUNICATION FROM THE COMMISSION: A Roadmap for moving to a competitive low carbon economy in 2050

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0112:FIN:EN:PDF>. "Combating climate change is a top priority for the EU. Europe is working hard to cut its greenhouse gas emissions substantially while encouraging other nations and regions to do likewise."

http://ec.europa.eu/clima/policies/brief/eu/index_en.htm.

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

with respect to the investments, and; information showing that no undue distortions of competition will be created and that no dominant position on the market is strengthened¹⁰.

The option under Article 10c 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 generation¹¹. 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 free¹².

One of the prerequisites enabling member states to apply under Article 10c is that more than 30 percent of electricity was produced from a single fossil fuel (in Czech Republic it is coal), and that they have lower GDP than the average GDP per capita at market price of the Community¹³. At the same time, member states wishing to apply for the derogation should ensure that the investments identified in the national plan should be designed to eliminate in the future, to the extent possible, the situation where more than 30 percent of electricity is produced from a single fossil fuel.¹⁴ It is established in Article 10c, para. 1 that the member state concerned 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 Guidance document stating that the investments identified in the national plan should contribute to the diversification, as well as reduction in carbon intensity, of the electricity mix and the sources of energy supply for electricity production.¹⁵ In case the application does not fulfil the requirements set out by EU law and the investments listed in the national plan do not follow these provisions and/or do not contribute with the possible extent to the fulfilment of the Directive's objective, they should be dismissed and the Commission in its position¹⁶ can and should 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 and the relevant provisions of the *acquis communautaire*.

In order that the Commission makes a well-founded assessment of the application submitted by the Czech authorities, and to be able to consider information and views from other sources as stated in the Guidance document paragraphs 25 and 60, we would like to provide the following comments and information concerning the Czech application.

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 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.

¹² Guidance document, para. 1.

¹³ Article 10c, para. 1 c of Directive 2009/29/EC.

¹⁴ Guidance document, 4.1. Principles for the National Plan, para. 23, Principle 2.

¹⁵ Guidance document, 4.1. Principles for the National Plan, para. 23, Principle 5.

¹⁶ Article 10c, para 6 of Directive 2009/29/EC: "The Commission shall assess the application taking into account the elements set out in paragraph 5 and may reject the application, or any aspect thereof, within six months of receiving the relevant information." Further, Guidance document, para. 25. Questions and Answers: What is the role of the European Commission in the assessment and implementation of the derogation? http://ec.europa.eu/clima/policies/ets/auctioning/derogation/faq_en.htm.

3. REVIEW OF THE PREPARATORY PROCESS OF THE CZECH APPLICATION

Just a few days after the Directive 2009/29/EC was published in the Official Journal in June 2009, the Czech parliament already had on the table a legislative amendment transposing Article 10c. The amendment then smoothly passed through the parliament as part of another, unrelated legislative act, irrespective of non-existing guidance from the Commission and ignoring the proper legislative process. A list of investments was then prepared without any prior knowledge, information, requirements and criteria set out in the application form and national investment plan.

The Czech Act transposing Article 10c states that 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 for remote access. The Ministry prepared a draft of the application and published it with a delay after our call in early December. 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 Guidelines. Subsequently, the Ministry of Environment reworked the draft application and published the final version in August 2011. In September 2011 it was submitted to the Commission.

The Czech government decided to allocate for free over 108 million allowances in the period 2013-2019 to 51 companies for 85 installations.

3.1 Insufficient publication of the application and incomplete materials released for public consultation

The application and National Plan of Investments are vital documents stipulating the energy policy of the member states wishing to apply for the derogation. They will determine the modernisation and investment processes within the energy sector for almost ten years,¹⁷ predetermining the transition towards more efficient low carbon economies in the EU¹⁸.

The Czech application with the National Plan is therefore of crucial importance for the whole state and the future of its energy production and market – thus the decision making over these documents and their subsequent approval will obviously have a fundamental impact both on the energy sector and the environment.

It is therefore reasonable to conclude that only a due and proper process of assessment of these documents, with comments from the public consultation taken into account considering the modernisation of the electricity sector, the development of clean technologies and the cost-effectiveness of the intended investments in comparison with other alternatives, will allow for legitimate approval of the national plan.

As the revised EU ETS Directive does not provide specific provisions for the participation of the public, it is necessary to use the general provisions of the SEA Directive and the Aarhus Convention that are now part of EU

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.”

¹⁸ Recital 17 of the Directive 2009/29/EC: All member states will need to make substantial investments to reduce the carbon intensity of their economies by 2020 and those member states where income per capita is still significantly below the Community average and the economies of which are in the process of catching up with the richer member states will need to make a significant effort to improve energy efficiency.

law¹⁹. The Aarhus Convention was signed by the European Community on 25 June and the Council ratified it on 17 February 2005. Since then it is necessary to interpret the relevant provisions of Community law in compliance with the Aarhus Convention.²⁰ Therefore, it is also advisable to refer to the relevant provisions of the Aarhus Convention.

The common principle of the SEA Directive, as laid down in Article 4 of the SEA Directive, is to ensure that plans, programmes and projects likely to have significant effects on the environment and which include among others the energy sector, are made subject to an environmental assessment, prior to their approval or authorisation. Consultation with the public is a key feature of environmental assessment procedures. The SEA Directive aims to provide a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation of projects, plans and programmes, with a view to reduce their environmental impact. Thus, public participation in decision-making is ensured, and thereby the quality of decisions is strengthened.²¹

Pursuant to Article 6 of the SEA Directive, para 2, the authorities and the public shall be given an early and effective opportunity within appropriate timeframes to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme, or its submission to the legislative procedure. A necessary precondition for expression of opinion and effective public participation is access to documents that present the basis for the intended plan or programme.

Under the provisions of the Aarhus Convention, namely Article 6 para. 4, early public participation shall be provided when all options are open and effective public participation can take place. Further, Article 7 provides for appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, and having provided the necessary information to the public.

In addition, under Section 6 of the Guidance document,²² member states should publish an application before submitting it to the Commission to enable the Commission to consider information and views from other sources. Moreover, according to the Template for the application pursuant to Article 10c (5), as provided by Annex VII of the Guidance document, member states should summarise the process by which the application and the plan has been prepared and how the public has been informed and involved²³.

In the Czech Republic, the process was as follows. On 19th of August 2011 the Ministry of Environment published the application on its website with the opportunity for the public to send their comments until the 26th of August. This information was neither publicly announced nor discussed; 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.

More importantly, the released information and available documents did not include the most essential part of the application – the National Plan of Investments. Thus the interested public was not permitted to review and assess the application in its entirety.²⁴ The public therefore could not provide comments and insights with the necessary information and knowledge about concrete investments for the free allocation of allowances. The public could have provided useful comments in relation to the most cost-effective investments related to the retrofitting and upgrading of infrastructure and clean technologies, thus strengthening the quality of the Czech

¹⁹ ECJ, Judgment of the Court of 8 March 2011, Case C-240/09, para. 30: “The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union”.

²⁰ Jans, J. H. *European Environmental law*, Europa Institut University of Amsterdam, Amsterdam, 2008, p. 214.

²¹ <http://ec.europa.eu/environment/eia/home.htm>.

²² Monitoring and Enforcement, 6.1. Assessment of the application, para. 60.

²³ Guidance document, ANNEX VII, Section E: Transparency and public consultation.

²⁴ The National Plan of Investments appeared on the website of the Ministry of Environment only after the public consultation was closed.

application with regard to the Directive's objective and EU climate and energy policies²⁵.

Finally, according to Annex II of the Czech application²⁶ that covers the aspects of transparency and public consultation, the Ministry of Environment was supposed to deal with all comments submitted from the public. According to all available evidence, the Ministry neither dealt with comments from the public, nor has it taken into account the outcomes of the public consultations as required under Article 8 of the SEA Directive, nor did it officially publish the submitted comments or inform the public²⁷.

To summarise, the way in which the information was made available to the public made it difficult to learn about the application and the National Plan: the Czech public did not have an opportunity to review and comment on the intended investments because the information was not released, the timeframe for the consultation – one week – could not be perceived as sufficient and, finally, the Czech authorities did not take into account the received comments from the public or inform the public. We strongly object that this form of publication fulfils the requirements set up for the obligation to provide for real and effective public participation in the process as established by Article 6, para. 2 of the SEA Directive²⁸ and the provisions of the Aarhus Convention.

The aforementioned information leads to the conclusion that the process of publication of the application and the National Plan was insufficient and the Commission should call for its revision. The Czech application and the National Plan should be rejected until the process is conducted properly, allowing for effective public participation.

3.2 Failure to verify whether an environmental assessment of the national plan is required, resulting in a missing environmental assessment²⁹ during the preparation of the Czech application

As pointed out in the Guidance document,³⁰ member states should verify whether an environmental assessment of the national plan is required on the basis of the provisions of the SEA Directive. Under the SEA Directive an environmental assessment should be carried out for the plans and programmes which are likely to have significant environmental effects and which are prepared, among others, for the energy sector. For the purposes of the SEA Directive, pursuant to Article, 2 “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; required by legislative, regulatory or administrative provisions.

Article 3 (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

²⁵ Formulated, for example, in COMMUNICATION FROM THE COMMISSION: A Roadmap for moving to a competitive low carbon economy in 2050

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0112:FIN:EN:PDF>.

²⁶ Annex II (Příloha II – Metodická zpráva) Part E.1. “Has the application been published before submitting it to the Commission? If so, when, where and how has it been published? If not, why not?”.

²⁷ SEA Directive: Article 8: “Decision making – The environmental report, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.”

²⁸ Recital 15 of the SEA Directive: “The public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion”. Article 6, para 2: “The authorities and the public shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.”

²⁹ Specifically, the Strategic Environmental Assessment established by the SEA Directive.

³⁰ Guidance document, Art. 4,4.1, para 26, Art.6, 6.1, para 60.

budget plans and programmes are excluded from the scope of the directive. However, these provisions can be compared to the EIA Directive that introduces similar exceptions and these were narrowly interpreted in Case C-435/97.³¹ The Court said that such exclusions are an exception to the general rule requiring the assessment and that they must be interpreted restrictively.

The purpose of the national plan is to ensure that the identified investments lead to reductions in greenhouse gas emissions, and to this end are undertaken in retrofitting and upgrading the infrastructure, in clean technologies and in diversifying the energy mix and sources of supply, thus leading to a low carbon economy and helping to achieve EU Climate targets.³² The national plan presents the roadmap 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 State Energy Strategy for the upcoming period.³³

The Czech application, in particular the National Plan of Investments for the modernisation of the infrastructure and cleaner technology in energy production, fulfils the 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. – this concerns the energy sector, it is very likely to have significant environmental effects and, lastly, it was adopted by the Czech Government³⁴. In sum, the National Plan of Investments qualifies as a plan for which an SEA is required under EU law and the obligatory environmental assessment on the basis of the provisions of the Czech Act No. 100/2001 Coll.

With regard to the requirement to verify whether an environmental assessment is required, the Czech Republic in its application³⁵ states that it has considered this obligation and concludes that the application does not fulfil the character of the plan under Act No. 100/2001 Coll.³⁶ because it falls within one of the exceptions that the financial and budgetary conceptions shall not be subject to such an assessment. As a result, no environmental assessment was conducted for the Czech national plan.

As already mentioned, the purpose of the national plan is to prepare a roadmap for the energy sector for the next almost ten years and bring member states concerned to the default auctioning of allowances in the next period. Hence, it is obvious that the primary intent of the national plan and Article 10c is not to distribute financial incentives to projects, but to provide the energy sector in those disadvantaged member states with the

³¹ World Wildlife Fund v. Atonome Provinz, ECR I-5613, paras.65-66.
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997CJ0435:EN:PDF>. “The Directive does not cover 'projects serving national defence purposes'. That provision thus excludes from the Directive's scope and, therefore, from the assessment procedure for which it provides, projects intended to safeguard national defence. Such an exclusion introduces an exception to the general rule laid down by the Directive that environmental effects are to be assessed in advance and it must accordingly be interpreted restrictively. Only projects which mainly serve national defence purposes may therefore be excluded from the assessment obligation. It follows that the Directive covers projects which have the principal objective of restructuring an airport in order for it to be capable of commercial use, even though it may also be used for military purposes.”

³² Article 1 of the EU ETS Directive: The ultimate aim of the EU ETS is to establish a scheme for greenhouse gas emission allowance trading within the Community in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner. It also provides for reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change.

³³ For the State Energy Strategy an SEA is required, for comparison see: http://www.mzp.cz/en/news_pr090115NES.

³⁴ http://www.mzp.cz/en/news_110922_emission_allowances.

³⁵ Annex II (Příloha II – Metodická zpráva). 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.

³⁶ Czech Act on Environmental Impact Assessment and Amending Some Related Acts (Act on Environmental Impact Assessment).

opportunity to diversify their energy mix, to support the development of clean technologies, to increase energy efficiency, etc. via the free allowances.

Therefore, the argument from the Czech authorities should be rejected and an environmental assessment for the national plan should be conducted. This failure to carry out an environmental assessment has resulted in a breach of the following provisions of the SEA Directive – Art.3, Art.4 para. 1, Art.6 paras. 1 and 2, Art.8, Art.9.

Should the national plan not undergo an SEA, this would be perceived as a breach of the SEA Directive. The European Commission is the institution responsible for ensuring EU law is properly applied throughout all member states and one of its main roles is to enforce European Law. Therefore, the Commission cannot and should not approve documents that were adopted in breach of EU law, and these materials should be rejected entirely.

4. INFORMATION ON THE CONTENT OF THE CZECH APPLICATION AND THE NATIONAL PLAN

4.1 Insufficient monitoring and enforcement provisions with respect to the intended investments pursuant to the National Plan

The EU ETS Directive requires that the application form should contain monitoring and enforcement provisions with respect to the intended investments listed in the national plan. Pursuant to Article 10c(5)(d), any member state that intends to allocate allowances on the basis of Article 10c shall submit an application containing, among other elements, monitoring and enforcement provisions with respect to the intended investments pursuant to the national plan. These provisions are further specified in the Guidance document, in part 6.2. The monitoring and enforcement provisions are pursuant to Article 10c(5) of Directive 2003/87/EC. The Guidance document also provides examples of compliance indicators used to demonstrate that investments comply with the principles laid down in the guidance, in particular with regard to the requirements for the national plans³⁷.

With the aim of ensuring proper execution of the identified investments, clear and effective monitoring and enforcement provisions should be set out in a detailed manner in the application. Further, member states should ensure that they have in force the laws, regulations and administrative provisions that are necessary to subject investments to scrutiny through the competent national authorities clearly identified in the application.³⁸

Required monitoring and enforcement provisions are, in the Czech application, provided in the following manner. Article 10a of the Act No. 695/2004 Coll. establishes the obligation for investors to include in their submissions also suggestions for monitoring provisions for the intended investments³⁹. Further, the investor who is going to benefit from the free allocation has to submit every year a report on implementation of the intended investments. In case the annual report is incomplete or inaccurate, the Ministry of Environment will require additional information or the revision of the report. It is established that investors obtaining the free allowances should carry out all investments by the end of 2019. There is a financial penalty for non-compliance with the annual report requirements established and a penalty for failure to implement the investment⁴⁰. However,

³⁷ Guidance Document, ANNEX VIII, Examples of compliance indicators.

³⁸ Guidance Document, 6.2. Monitoring and enforcement provisions pursuant to Article 10c(5) of Directive 2003/87/EC, para 61 and following.

³⁹ Article 10a, para 3c, Act No. 695/2004 Coll.

⁴⁰ Act No. 695/2004 Coll., Article 18, Para. 1 Provozovatel zařízení se dopustí správního deliktu tím, že (h) do konce roku 2019 neprovede veškeré investice, na jejichž základě obdržel bezplatné povolenky podle § 10a, i) nepodá, nedoplní nebo neupraví zprávu podle § 10a odst. 6. Para. 3 Za správní delikt podle odstavce 1 se uloží pokuta (c) do 500 000 Kč, jde-li o správní delikt podle písmene i). Para. 5 Za správní delikt podle odstavce 1 písm. h) se uloží provozovateli převést finanční částku, která odpovídá hodnotě bezplatně přidělených povolenek k datu jejich přidělení navýšenou o index cen

should the investor fail to implement the intended investments, they would – as a penalty measure – pay the value of the free emission allowances to the state organisation. This provision can not be perceived as effective, proportionate and dissuasive. The main monitoring element of the Czech application is thus the annual report on the implementation of the intended investments as identified in the National plan.

However, the information about the requirements established for the annual report is to be adopted by the secondary legislation⁴¹ and is not yet available. Thus, it is not possible to assess how the effective monitoring and enforcement of the Czech investments will be secured. Up to now, the established provisions neither contain nor define compliance indicators, nor are provisions on field supervision provided. No on-the-spot checks nor an annual independent verification by external auditors for each investment, a third-party quantitative and qualitative assessment of investments to provide substantiated and independent evidence that investments comply with EU ETS Directive, the Guidance document, or the national plan are put in place.⁴²

The existing application does not contain these provisions. Furthermore, the proposed provisions do not provide a clear and detailed description of this requirement. Therefore, we call on the Commission to require these provisions from the Czech authorities. The Commission should ask for detailed arrangements and explanation by the Czech authorities as to how the monitoring and enforcement will be ensured and, more importantly, how it will be set up in detail in the existing legal provisions. The Commission may give the Czech Republic a deadline for revision of the application form; however if no amendments are taken, the application has to be rejected.

4.2 Insufficient information on the potential distortion of competition and the probability that the dominant position of ČEZ, a.s. will be strengthened

Article 10c(5), letter (e), of the EU ETS Directive establishes that those member state that intend to allocate free allowances on the basis of this Article shall submit to the Commission an application containing information showing that the allocations do not create undue distortions of competition. Further, Principle 3 from the Guidance document states that investments must neither reinforce dominant positions nor unduly distort competition and trade in the internal market and, where possible, should strengthen competition on the internal market for electricity.

In the Czech Republic, the market share of the largest producer of electricity, ČEZ, a.s., was 72.9 percent in 2008. ČEZ, a.s., will also be the recipient of 63 percent of free allowances. Therefore, there are reasonable concerns that the company's dominant position will be strengthened.

The Ministry of Environment in the application explains that the allocation of free allowances will not distort competition because the allocation methodology does not favour any operator and it is applied equally to all eligible installations. However, this justification cannot be considered sufficient because the distortion of competition can be generally caused directly by the free allocation of allowances and it is the responsibility of the applicant member state to choose a method of allocation that best ensures competition and prevents undue distortion.

průmyslových výrobců, na účet Státního fondu životního prostředí.

⁴¹ Article 10a, para 6, Act No. 695/2004 Coll., Annex II (Příloha II – Metodická zpráva) in response to point 2.3.

⁴² Guidance Document, 6.2. Monitoring and enforcement provisions pursuant to Article 10c(5) of Directive 2003/87/EC, para 63.

Document “Analýza trhu” (Analysis of the market) is attached to the Czech application as Annex III. It concludes that no distortions of the competition are probable and that the allocation of free allowances will not have any negative impact. However, the document was prepared by ČEZData, s.r.o.⁴³, which is a part of the ČEZ Group.

The Czech Republic should sufficiently explain how competition will be ensured and support its position through independent documents and expert materials.

4.3 Investments in the Czech National Plan

The basic principles for the assessment of the eligibility of the intended investments listed in the National Plan are set forth in Article 10c, para.1 of Directive 2009/29/EC and the Guidance document. The investments should aim to provide for “retrofitting and upgrading of the infrastructure and clean technologies” and “diversification of their energy mix and sources of supply”. Further, these investments should contribute to emissions reduction in a cost effective manner, they should contribute in the future to the elimination of the situation that permitted member states to apply for free allocations under Article 10c and they should contribute to decreasing the share of coal in the electricity mix and to diversify the sources of electricity production in the member states in question. Moreover, the listed investments should be undertaken after 25 June 2009.

Investments that do not follow the aim and motivation behind the derogation under the provisions of EU ETS Directive, and that do not fulfil the criteria and requirements set forth in the Directive and the Guidance document, should not be perceived as eligible for the National Plan, and thus should not be included in the National Plan and should be turned down by the Commission.

4.3.1 Insufficient or missing information about intended investments – 58 projects

Article 23 of the Guidance document set up six principles⁴⁴ under which the Commission has to assess the eligibility of the investments. Pursuant to Article 25 “When assessing the application submitted pursuant to Article 10c(5) of Directive 2003/87/EC, the Commission will analyse to which extent the investments identified comply with these principles. If the information provided by member states in their application pursuant to Article 10c(5) of Directive 2003/87/EC is not sufficiently detailed for the Commission to carry out a comprehensive assessment allowing for a well-founded conclusion, the Commission may request additional information. If this additional information cannot be provided in due time, the Commission will reject the corresponding parts of the national plan. The Commission may also consider information and views from other sources to inform its assessment of the application.”

The Czech National Plan provides only very limited information about the actual investments. On the basis of this fragmentary information provision, it is very difficult and in some cases even impossible to assess whether the intended investments are in compliance with the principles laid down in Article 23 of the Guidance document, as well as whether any connection with the objectives of investments established by Article 10c and consequently the entire Directive 2009/29/EC exists. For example, investment No.29 is described as follows: “Connection of new customers to the central source of heat in Most and Litvinov”; investment No.131 is described as “Chemical management”, and investment No.161 contains only the following information: “Waste recovery”.

In general, it is important to note that the National Plan does not provide information sufficient for evaluating whether Principle 1 set forth in the Guidance document is fulfilled. Principle 1 requires that the national plan

⁴³ Check the properties of the document, noting that ČEZData, s.r.o., is part of the ČEZ Group, see: <http://www.ČEZ.cz/cs/pro-investory/informacni-povinnost/1158.html>.

⁴⁴ Art.4, 4.1, para. 23, Requirements for the national plan, Principles for the National Plan.

should identify investments that, directly or indirectly, contribute to decreasing greenhouse gas emissions in a cost effective manner. Furthermore, it should be emphasised that Principle 1 is also the fundamental principle of the whole EU ETS Directive and EU Emissions Trading System. The Czech National Plan does not then contain any information about whether the intended investments contribute to reducing emissions. As a result, it is not possible and feasible to assess the cost-effectiveness of the intended investments and their contribution to the reduction of GHG emissions.

As a result of this lack of information about the investments in the National Plan it is also very difficult to assess whether the investments meet other principles given by the Commission. From our review of the investments list and their given descriptions, we conclude that in the case of at least 164 investments⁴⁵ it is not obvious what is their relation to the purpose of Article 10c or to the EU ETS Directive. Another 58 investments might be in some way connected to the objective of Article 10c, but their descriptions are so unsatisfactory that it is not possible to further examine the nature of these investments.

With regard to this situation, we consider it necessary to request additional information about those investments that would be sufficient for reasonable assessment of the fulfilment of the principles and aims of the objective of Article 10c and the EU ETS Directive. Should the Czech Republic not sufficiently and in a timely fashion prove the compliance of the investments with the principles (especially Principle 1), it will be necessary to exclude these investments from the National Plan on account of their ineligibility.

4.3.2 Ineligible investments that started the investment process before 25 June 2009

Directive 2009/29/EC and the Guidance document state that the investments in the national plan are eligible for the purposes of the Directive if they were started from 25 June 2009 onwards. This is the date of entry into force of the Directive. Therefore, it is evident, that Article 10c of Directive is intended to encourage investments in new projects that are planned with the knowledge of the existence of Article 10c. A member state's decision to apply Article 10c should actually be an investment incentive to invest in upgrading infrastructure and clean technologies. Another interpretation would lead to financial support for investments that would be undertaken regardless of the existence of Article 10c and the member state's derogation. Such a procedure would actually be a mere reimbursement for planned projects without any additional value for the reduction of GHG emissions and pursuing the aim of the EU ETS Directive. Moreover, the reimbursement of investment projects scheduled regardless of the existence of Article 10c cannot be considered as a cost-effective way to reduce emissions. For these reasons, we believe that only investments scheduled at least from the date of adoption of Directive 2009/29/EC should be considered to be eligible.

Article 10c of the EU ETS Directive sets out in para. 1 "Investment undertaken from 25 June 2009 may be counted for this purpose". The Guidance document in para. 28 states "In view of the title and overall context of Article 10c of Directive 2003/87/EC, investments eligible under this provision should concern the electricity sector and are to be undertaken from 25 June 2009".

The aforementioned provisions clearly lay down that the investment process must not have been started before 25 June 2009. The question is how to define the "physical initiation" and execution of the investments. On the basis of the interpretation of the objective of Article 10c, we are convinced that the investment is already started at the moment of the announcement of the project under the EIA Directive (85/337/EEC). In the opposite case, Article 10c would allow reimbursement for the projects planned before the entry into force of Directive 2009/29/EC, and that is certainly not the purpose of this provision.

⁴⁵ See Annex II – Reference table of intended investments, the information in column "R".

The Czech Act No.695/2004 Coll., in its Article 10a clearly states that investments must be launched from 25 June 2009 onwards, while its next paragraph states that the physical initiation of the investment process means the notification of the intention pursuant to Act No. 100/2001 Coll. on Environmental Impact Assessment.

We consider this interpretation to be the only one possible with regard to the purpose of the EU's ETS Directive as expressed in Article 1 "Directive establishes a scheme for greenhouse gas emissions allowance trading within the Community in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner". It is reasonable to conclude that the reimbursement for investment projects scheduled regardless or prior to the existence of Article 10c cannot be considered a cost-effective way to reduce emissions in compliance with the EU ETS Directive and fulfilling its primary aims.

Our analysis of the National Plan has shown that at least ten large investment projects were started between 1 and 4 years before 25 June 2009 (and the other large investment No. 48 is most likely ineligible too). The total value of these investments is CZK 51 516 400 000 , that is one third of the value of all investments listed in the Czech National Plan. The list of ineligible investments together with background information about them is given in Annex I of this document.

4.3.3 Investments ineligible due to breach of other requirements

Among the listed investments is even one project causing an increase in GHG emissions, thus being in absolute contradiction with the spirit and purpose of the EU ETS Directive. It is investment No. 223, the installation of condensing turbine TG6 (and accessories) leading to increased thermodynamic efficiency, Operator: Teplárna České Budějovice, Value: CZK 258 703 000.

In fact this investment will be a replacement of an outdated back-pressure turbine TG3 for condensing turbine TG6, with power capacity of 12 MW in a heating plant in České Budějovice. The investor justifies this intention by the economics of the heating plant. At present, the heating plant is operating only in the season when the heat is needed. After the intended investment, the plant will also be running in summer to produce electricity, but since there will be no demand for the heat, the excessive heat will be uselessly consumed in the newly constructed cooling towers.

The fuel for this heating plant is almost totally derived from brown coal (98 percent). The heating plant does not have desulphurisation installed. Realisation of this investment would imply an increase in coal consumption by more than 24 thousand tons of brown coal annually, which involves higher emissions of sulphur oxides, dust and carbon dioxide. The overall energy efficiency of the heating plant would be reduced. In an earlier draft of the Application of Czech Republic, dated November 2010, the Ministry of Environment states GHG emissions savings of 6,318 tons of CO₂ per year. However, these savings have been neither demonstrated in the integrated permit for the project or in the screening process in the EIA.

Based on this information, it is obvious that this investment (No. 223) is fundamentally inconsistent with the purpose of Directive 2009/29/EC and the Guidance document, mainly with Principle 1 in para. 23, and para. 28 of the Guidance document because the investment does not contribute to a reduction in emissions, but on the contrary will increase GHG emissions.

The other questionable project is listed as No. 3 – a new thermal power plant in Mělník with a value of CZK 16 458 000 000 planned by ČEZ. This project was scheduled before 25 June 2009 and it is highly probable that it was planned before the Directive 2009/29/EC was prepared and adopted.

The first information is dated from 29 April 2009: "ČEZ is preparing a thermal power plant in Mělník, which will ensure the delivery of heat for Prague in the future." The second information is dated from 25 June 2009: "ČEZ will build its first large thermal power plant in the Czech Republic." In a press release from 25 June 2009 issued

by ČEZ, it is stated: “At the end of April, ČEZ management approved the business plan for a new 800 MW thermal power plant in the Mělník location⁴⁶.”

It is reasonable to assume that an investment of such importance and size was not planned or proposed in a time of a few weeks, or even months. Therefore, we call for a review of this investment as it is probable that it does not fall within the eligibility criteria of the Directive.

4.3.4 Investments directed towards the heating sector

The title of Article 10c of Directive 2009/29/EC reads as follows: “Option for transitional free allocation for the modernisation of **electricity generation**.” The Guidance document in para. 28 states: “In view of the title and overall context of Article 10c of Directive 2003/87/EC, investments eligible under this provision **should concern the electricity sector** ... However, as a matter of principle, **investments in other energy sectors are not excluded, on condition that they benefit from strong justification on the basis of Article 10c** of Directive 2003/87/EC.”

Given these provisions, it is obvious that investments should be primarily aimed at the electricity sector and, if the investments are focused on other sectors too, this exceptional procedure should be sufficiently justified.

Roughly 85 percent of investment projects in the Czech National Plan will go to the modernisation of the equipment used to produce heat (the total value of these investments is approximately CZK 63.5 billion, that is 41 percent of the total value of investments in the national plan). Unfortunately, the exact number of investments proposed for the heat equipment is difficult to determine because the descriptions of investments are very general and vague, thus do not give sufficient information on whether the investments are leading to the modernisation of electricity production or not.

Nevertheless, a large number of investments in the Czech National Plan is aimed at the modernisation of heating equipment⁴⁷, which is contrary to the purpose of Article 10c of Directive 2009/29/EC and there is no justification given for it, nor explanation of the situation provided.

4.3.5 Cost inefficiency of investments in the Czech National Plan

Article 1 of the EU ETS Directive states: “This Directive establishes a scheme for greenhouse gas emissions allowance trading within the Community in order to promote reductions of greenhouse gas emissions in a **cost-effective and economically efficient manner**.” Principle 1 of the Guidance document states: “The national plan should identify investments, which directly or indirectly contribute to decreasing greenhouse gas emissions **in a cost effective manner**.”

From these provisions it is evident that a Member State is obliged to ensure that the investments listed in the National Plan will be cost-effective. Greening is probably the simplest way to determine the cost effectiveness of the intended investments.

With regard to the cost-effectiveness of the proposed investments in the Czech Republic, the Czech Ministry of Environment had required that applicants provide information about the greening of the investments (i.e. the investment costs of the reduction of one ton of CO₂ per year). However, the Czech Ministry of Environment did not set up any explicit greening threshold for the investments in the application, and the final version of the National Plan does not even contain any information about greening at all. In the application it is only

⁴⁶ See the last sentence of the tenth paragraph: www.čez.cz/cs/pro-media/tiskove-zpravy/2516.html.

⁴⁷ See Annex II – Reference table of intended investments, information in column “Q” – Investments in the heating sector.

mentioned that operators had to calculate the greening of the projects. Therefore, it is not possible to assess if the proposed investments reduce GHGs in a cost-effective manner.

In the draft of the “methodical guidance for applications for free allocation for electricity production” prepared by the Ministry of Environment in spring 2010, the ministry proposed that only investments with greening below 400 EUR/ton CO₂ would be eligible for the full amount of free allowances, while in the draft from May 2011, the greening level was lifted to 4000 EUR/ton CO₂. In the “report on methodology” that accompanied the application and National Plan prepared for the government's approval, the ministry again stated that only investments with greening below 4000 EUR/ton CO₂ were eligible for the full amount of free allowances, while the allocation of free allowances for those investments above the 4000 EUR threshold was reduced accordingly. Since neither the application nor the National Plan provides details on the meeting of this criterion, it is not possible to assess if and how it was imposed on the investments.

The draft application and National Plan from May 2011 contain information about the emissions reductions that would be achieved by the proposed investments. This information was provided to the Ministry of Environment by the applicants. Therefore, it was possible to calculate the greening of 291 investments and find out that the greening ranges from 12 EUR/ton CO₂ to an unbelievable 232 000 EUR/ton. The greening of 38 investments is higher than the former requirement of 4000 EUR/ton (see Annex II). However, it was not possible to obtain data on the remaining 79 investments, among others including four large projects of ČEZ, a.s. with a total value of over CZK 36 billion.

To summarise, the available data shows a huge range of the values of greening (in some cases the costs are unbelievably high)⁴⁸. As a result it could be claimed that the Czech Republic has not required the cost-effectiveness of these investments (e.g. by established minimal threshold for the greening, by which investments can be considered to be cost-effective), further it has not sufficiently examined the cost-effectiveness of the investments listed in the National Plan.

We conclude that the intended investments with a high rate of greening cannot be considered to be a cost-effective reduction of greenhouse gas emissions and that they should be excluded from the National Plan.

4.3.6 Investments do not contribute to a reduction in the dependence on coal

The first condition referred to in Article 10c, letter (c) of the EU ETS Directive reads as follows: “In 2006, more than 30 percent of electricity was produced from a single fossil fuel”. Principle 2⁴⁹ from the Guidance document set forth the requirement that the investments identified in the national plan should be designed to eliminate in the future, to the extent possible, the situations referred to in Article 10c(1), letter (a) and (b) and the first condition of (c) of the EU ETS Directive.

According to Eurostat data, the share of coal in gross electricity production in the Czech Republic in 2006 was 51.71 percent. Due to the high share of coal, the Czech Republic has the option to use the derogation Article 10c.

The Czech Republic remains very dependent on coal for its electricity production. In 2010, there was approximately 60 percent of electricity produced from coal according to data reported in the current draft of the Czech National Energy Strategy. Thus, investments identified in the national plan should lead to the reduction of the share of coal in the gross electricity production in the Czech Republic.

⁴⁸ These data are not taken from the final version of the application and are also incomplete.

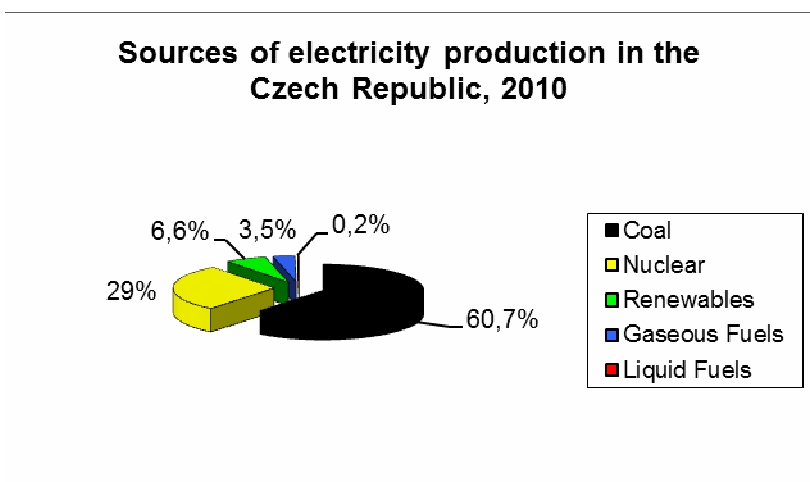
⁴⁹ Art.4, 4.1, para. 23, Requirements for the national plan, Principles for the National Plan.

The Czech National Plan includes a significant share of investments aimed at upgrading coal-fired installations. According to our analysis based on information from the National Plan, the total value of these investments is approximately CZK 71 billion, which is about 46 percent of all investments listed in the National Plan. However, these values should not be taken as complete, because about 5 percent of the investments is not possible to distinguish by fuel type.

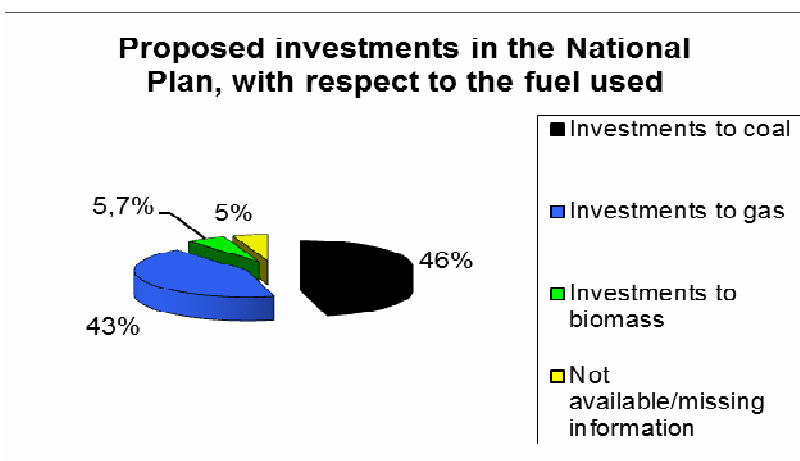
Nevertheless, the above-mentioned number of investments aimed at upgrading coal-fired installations shows that the Czech National Plan does not contribute to the reduction of the share of coal in national electricity production. On the contrary, support for investments referred to in the National Plan would lead to maintaining the high share of coal in electricity production, this being in direct contradiction with the purpose of Article 10c of the EU ETS Directive and Principle 2 of the Guidance document.

4.3.7 Investments do not contribute to diversification and the reduction of carbon intensity

According to Article 10c, the national plan shall also provide for the diversification of the energy mix and sources of supply in the concerned member states. Further, Principle 5 stated in para. 23 of the Guidance document reads as follows: "Investments identified in the national plan should contribute to diversification, and reduction in carbon intensity, of the electricity mix and the sources of energy supply for electricity production".



The proposed investments from the National Plan will contribute to the following sources of energy in the Czech Republic.



This data above shows that the investments in National Plan are primarily targeted to maintaining and extending the operation (230 projects) or even constructing brand new (3 projects) coal fired installations and supporting the construction of new gas fired installations, while at the same time almost ignoring opportunities in the renewable energy sector.

As mentioned, member states applying for the derogation should ensure that the investments identified in the national plan are designed to eliminate in the future, to the extent possible, the situation when more than 30 percent of electricity is produced from a single fossil fuel and reduce the carbon intensity of electricity production. The national plan should thus deliver a “transformation programme” that will help the applying member state to “upgrade” its energy sector in a way that will allow its competitiveness after the full auctioning to be applied after 2020. The National Plan submitted by the Czech government apparently ignores this requirement. The only diversification of the energy mix that can be seen in the Czech National Plan relates to increasing the share of yet another fossil fuel, gas, in the energy mix. The National Plan will thus contribute to maintaining a high share of fossil fuels in the energy mix while also increasing the dependency of the sector on the external supply of gas.

In addition to this, with such an extensive support that will increase the life span and competitiveness of fossil fuel (and in particular coal) fired installations, the Czech Republic will jeopardise its effort to reach its mandatory target of a 13 percent share of energy from renewable sources in gross final energy consumption by 2020. The opportunity for developing more sustainable alternatives, such as renewable sources (either in terms of expansion of a renewable electricity generation or upgrading the grid infrastructure), will be missed.

Since the proposed National Plan does not lead to a significant decrease in the carbon intensity of the Czech energy sector, and it is not clear how the investments can be regarded as contributing to diversification of the electricity mix ensuring its sustainability and competitiveness under the full auctioning duty, a revision of the proposed investments should be required by the Commission and reworked by the Czech authorities. The revised plan should provide a detailed justification of each coal related project included in the plan, namely considering the requirement for lowering the sector's dependency on coal, and increase the share of projects related to renewables.

4.3.8 Investments receiving funds under other public sources

According to the Guidance document for investments receiving funds under other EU sources and/or other public and private sources, the share of each EU funding source and other public and private funds in the total investment project should be given.

The Czech National Plan contains the investments of two companies that submitted an application for funding from the Operational Program (OP) Environment⁵⁰ (administered by the State Environment Fund) in order to comply with the emissions limits given by the IPPC directive.

The application of “Energetika Trinec” for EUR 15.2 million from the OP Environment in order to reduce emissions from its power plant has already been approved. This company at the same time proposed an investment of over EUR 75 million for the National Plan. “ArcelorMittal Ostrava” is another applicant for funding from the OP Environment and proposing an investment worth EUR 129 million in the National Plan. Due to a lack of detailed information about the investments it was not possible to find out if the projects from the above mentioned companies applying for funding from the OP Environment and contained in the NIP were identical. Further investigation of possible violation of rules for public support for identical projects is therefore needed.

⁵⁰ <http://en.opzp.cz/sekce/506/about-operational-programme-environment/>.

4.4 More free allowances to already over-allocated installations

Although the over-allocation in the second trading period does not legally prevent installations from further receiving allowances for free in the third trading period, we want to point to the fact that the overwhelming majority of the installations listed in the National Plan that might receive free allowances under Article 10c are already benefiting from overly generous allocations in the present period. Seventy-six out of the 85 facilities included in the application had extra allowances in 2008-2010 (the over-allocation ranges from 200 to 8 300 000 allowances, with Power Plant Tušimice owned by ČEZ, a.s. having the most free allowances). From the remaining nine facilities that had to buy allowances in the past, six are owned either by ArcelorMittal or ČEZ, a.s., i.e. the two companies that have the biggest surpluses of allowances within the whole EU ETS⁵¹. The further flow of free allowances to already over-allocated companies raises serious concerns about the scarcity of the market and likely distortions of competition.

A good example of the likely distortion of competition is the case of ČEZ, a.s. This majority state-owned company is, according to the application, supposed to receive 68.2 million free allowances out of the total 108.2 million to be allocated under Article 10c, i.e. 63 percent! ČEZ had 6.7 million allowances more than it needed in the years 2008-2010 (this is the total surplus of ČEZ, i.e. including shortfalls from its installations in Germany). ČEZ is therefore the only power producer in the EU that did not have to buy allowances at all.⁵²

⁵¹ Sandbag database. www.sandbag.org.uk.

⁵² Sandbag (2011). Carbon Fat Cats 2011. http://www.sandbag.org.uk/site_media/pdfs/reports/Sandbag_2011-06_fatcats.pdf

5. CONCLUSIONS

As the European Commission's decision about the Czech application and the National Plan will have a crucial impact on the Czech energy sector, we respectfully ask for a thorough review and assessment of the Czech application, National Plan and accompanying documents. As shown in this report, in many aspects it is necessary to ask the Czech government for sufficient information and explanation with regard to the adequacy, quality and the extent of claimed facts. Specifically:

1. As the process of preparation and adoption of the Czech application is in serious breach of the SEA Directive, it should be rejected until the process is conducted properly, allowing for effective public participation.
2. In their present form the obligatory monitoring and enforcement provisions are not sufficiently set out and detailed, thus the application should be reworked in this part.
3. To comply with the EU ETS Directive's provisions and the guidance given by the Commission, it is not possible to accept the investments listed in Annex I. of this document and investment No. 223 due to their ineligibility, and these investments should be dismissed.
4. For a well-founded assessment it is essential to ask for supplementary information about at least 58 questionable investments – these are marked in Annex II, with the information in column “R”.
5. An examination regarding the cost effectiveness of the GHG emissions reduction reached by the intended investments should be taken. The review of the portion of the investments leading to the modernisation of the heat production is also necessary. Further investigation of possible violations of the rules for public support for projects being possibly financed under the OP Environment is also needed.
6. Furthermore, in the Czech application it is not satisfactorily assessed whether by implementation of the National Plan the dominant position of ČEZ, a.s., will not be strengthened, and independent information showing that the allocations do not create undue distortions of competition is not provided. The Commission should demand an expert and independent study of the impact of the free allowances on the energy market in the Czech Republic.



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6. ANNEXES

ANNEX I – List of ineligible investments

1) Investment No. 2, New thermal plant in Počerady, Operator ČEZ, Value: CZK 19 455 700 000

Documentation for the Environmental Impact Assessment was prepared by SCES-Group in December 2008 and published on the website of the Regional Office on 15 January 2009. According to available data, the Czech company Energoprůzkum Praha compiled the final report on the engineering-geological and hydrogeological survey (EIA documentation page 25) for the investment project already in June 2008. More information is available at: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=MZP247.

2) Investments No. 4 and 5, New 660 MW source in coal-fired power plant Ledvice, Operator ČEZ, Value: CZK 18 892 000 000

The EIA process for this new source in Ledvice was finished in 2007. See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=MZP135. The integrated permit for the source was issued in April 2008. See information on the IPPC website: <http://www.mzp.cz/ippc>, code: MZPXXFMA0V3S.

3) Investment No. 17, Development of a heating plant Holešovice, Operator Chvaletice, Value: CZK 770 000 000

One part of this investment is the reconstruction of chemical water treatment plant, for which the EIA was completed in 2005.

See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=PHA153.

4) Investment No. 63, New power unit in Kladno, Operator: Alpiq Generation, Value: CZK 7 500 000 000

The EIA for this project was finished in March 2009.

See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=OV1084.

5) Investment No. 139, New technology – turbine TG 11, Operator: Plzeňská energetika, Value: CZK 1 200 000 000

Plzeňská energetika announced a tender for the supply and installation of a turbine approximately at a cost of CZK 600 million in October 2008.

See: <http://www.advantageaustria.org/cz/news/local/plzenska-energetika-kauft-turbine.cs.jsp>.

6) Investment No. 202, Installation of top source in Brno, Operator: Teplárny Brno, Value: CZK 1 550 000 000

Teplárny Brno announced this investment intention in December 2008. The EIA process started in February 2009.

See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=OV7080.

7) Investment No. 226, Conversion of coal boiler to biomass boiler in heating plant Domoradice, Operator: Carthamus, Value: CZK 498 700 000

Carthamus announced this investment in December 2007. The EIA was started in February 2009.

See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=JHC338.

8) Investment No. 266, Construction of new power unit for biomass combustion, Operator: Elektrárny Opatovice, Value: CZK 1 400 000 000

The EIA for this project was completed in April 2007.

See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=MZP139.

9) Investment No. 283, Replacement of existing turbine, Operator: ENERGY Ústí nad Labem, Value: CZK 250 000 000

This plan was announced by the operator in June 2008.

See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=MZP222.

10) Investment No. 48, Construction of new power unit, Operator: United Energy, Value: CZK 8 356 800 000

The description of this investment in the National Plan of Investments is very vague. It does not even provide an intended type of fuel for the new power unit (coal, gas, biomass). The company announced a plan to build a new coal power unit in Komořany – K3; the plan was announced in 2007. However, after the publication of the conclusions of the screening process by the Ministry of Environment, the operator withdrew the announcement of its plan.

See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=OV4054.

Today, the company is planning the construction of incinerators.

See: http://tomcat.cenia.cz/eia/detail.jsp?view=eia_cr&id=ULK627.

We consider it necessary to supplement the information on this investment for assessment of its eligibility. The available data does not clearly show whether the investment is an above-mentioned new coal-fired power unit, waste incinerators (which would mean an increase in emissions) or a totally different project.

ANNEX II – See separate sheet

ANNEX III - Extracts from Czech media reporting on the implementation of Article 10c

ČEZ rules over Europe. It has surplus of allowances for power plants.

<http://aktualne.centrum.cz/domaci/zivot-v-cesku/clanek.phtml?id=709208> (online news)

According to a Sandbag report, the power company ČEZ received for its plants in Germany less allowances than it needs. If ČEZ would operate only on the German market, only last year it would lack more than 1.2 million emission allowances. But ČEZ has overcome this shortage by allowances received in the Czech Republic, Poland and Bulgaria.

Czech Republic favours ČEZ against other competitors

<http://zpravy.e15.cz/byznys/prumysl-a-energetika/stat-zvyhodni-ČEZ-vuci-konkurenci-694805> (online business news)

The Czech Ministry of Environment faces criticism due to its new plan for allocation of emission allowances. The plan favours the Czech Republic's biggest energy company ČEZ against other producers of electricity and heat. Compared to previous drafts the Ministry changed its mind about the methodology of the allocation which is going to be used. Due to

this decision ČEZ will receive for free more allowances than was originally planned, whereas smaller companies will get less. The profit for ČEZ may reach tens of billions of Czech crowns.

Industry is governed by a few people around ČEZ and Škoda company

Hospodářské noviny, 17.10., Zuzana Kubátová (daily business newspaper)

Czech industry is secretly controlled by a strong group with diverse interests surrounding the heads of ČEZ and Škoda. The group includes businessmen, politicians, lobbyists, lawyers and investors.

Martin Roman, the general manager of Škoda in 2000–2003, saved this company from bankruptcy and prepared it for privatisation. The company was sold for CZK 800 million to Appian group. After the privatisation of Škoda, in 2004, Mr. Roman became general director and chairman of the board of ČEZ. Shortly after Mr. Roman's appointment, ČEZ started an investment programme worth CZK 100 billion, where Škoda was the main supplier.

Anti-corruption organisations demand removal of Martin Roman from Supervisory Board of ČEZ

<http://byznys.ihned.cz/zpravodajstvi-cesko/c1-53453050-protikorupcni-organizace-zadaji-odvolani-romana-z-dozorci-rady-CEZ> (online business news)

Eleven anti-corruption organisations are demanding an independent investigation of the affair around the transfer of Škoda Holding to investors hidden behind the Appian group and the potential conflict of interests of the former director of ČEZ, Mr. Martin Roman. "We act collectively, because we agree that this is one of the most serious affairs in Czech politics over the last decade. Martin Roman was the general director of ČEZ for 7 years without a security clearance and without preventive steps that would hinder the potential conflict of interests we have been speculating about already for many years," explained Martin Fadrný, a lawyer from the non-profit group Environmental Law Service.

The EU's free CO2 allowances: A gift to the rich

<http://www.euractiv.com/climate-environment/eus-free-co2-allowances-gift-rich-analysis-507850>

The Czech Republic's intention to hand out free CO2 allowances to ČEZ, an already profitable energy company, would turn it into a dominant actor on the EU energy market and paradoxically threaten competition, writes Barbora Hanzlova, from the Centre for Transport and Energy, a Prague-based non-profit group.

Czech team

<http://dialog.ihned.cz/komentare/c1-53372810-ceska-parta>

In recent weeks Czech media reported that ČEZ was a secret sponsor of Czech political parties, including the Social democrats (ČSSD) and the Civic democrats (ODS). Milan Urban (ČSSD), former minister of industry, lobbied for free allowances for ČEZ in 2008 and 2009. Martin Riman (ODS), former minister of industry, former chair of supervisory board of ČEZ and current chief advisor to prime minister Necas, has also lobbied for free allowances for ČEZ.