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CONTRIBUTION

From:	General Secretariat of the Council
To:	Working Party on the Environment
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Subject:	Air Quality Directive: Follow-up to the WPE on 11 July 2023 - comments from a delegation

Following the call for comments on the above set out with WK 9695/2023, delegations will find attached comments from CZ.

CZECH REPUBLIC

CZ comments following up the WPE meeting held on 11 July 2023

Article 19: Air quality plans (AQP)

A. Timeframe for establishing and implementing air quality plans (Article 19(1))

CZ would like to note that the AQP adoption date should be linked only to the validated air quality data, therefore the use of the expression “recorded” could be misleading, CZ is of the opinion that when describing the deadlines, the **emphasis should be put on the expression “from the end of the calendar year”** throughout art. 19 to clarify the deadlines and increase legal certainty.

Regarding the numerical values of deadlines, CZ considers them as unrealistic for achieving limit values/target values or AERO if the exceedance will occur after 2030. CZ also considers the timeframes in art. 19 as very confusing. CZ agrees with the fact that different pollutants might require different time to achieve compliance (we also have doubts whether AQP is a suitable instrument for ozone at all, see point B below). However, the timeframes proposed in art. 19 seem inconsistent (2 years for limit values as proposed by COM or PRES, as soon as possible or 5 years for ozone and AERO). CZ also does not follow why the updated air quality plan for limit values requires measures to be implemented over the course of 1 year to achieve compliance “as soon as possible”; the whole sentence relating to the updated AQP gives the impression that the development of updated AQP + consultation phase + adoption + implementation + impact on air quality - all of these must happen in 1 year which is in our opinion unrealistic.

Moreover, we note that having the same deadline for all MS for achieving limit values is not suitable given the differences in air quality levels and air pollution sources or other relevant criteria in various MS. CZ is of the opinion that the **deadlines in art. 19 for eliminating exceedance once it occurs should not be anchored in the text of the directive but should be established on individual basis for each MS pursuant the analysis done within the adopted AQP.** Otherwise this analysis and large part of Annex VIII serve no purpose.

CZ proposed therefore in the previous written comments to amend art. 19.1 as follows: *“...Those air quality plans shall set out appropriate measures to achieve the concerned limit value and to keep the exceedance period as short as possible as defined by comprehensive analysis included in the air quality plan according to the Section A point 5, 6 and 7 of Annex VIII, and in any case no longer than 3 years from the end of the calendar year in which the first exceedance was reported.”*

The approach proposed by the CZ above would resolve the issues mentioned by many MS, as well as by the CZ, that the **timeframe for achieving compliance proposed in art. 19 is unrealistic** since, as proven by many existing AQP, **it takes significantly longer** than 2 or 5 years for measures to be actually implemented and to bring tangible effect to the air quality. **The longer timeframe for achieving limit or target values that is common nowadays in the existing AQP is linked to administrative deadlines, legislative processes, consultations, information campaigns, mobilisation of funds etc. rather than to inaction of MS or ill intentions of MS.**

We do not agree with the COM that updated AQP requires less work compared to the original AQP. CZ notes that MS are required to do the same analysis as for the original AQP using

updated data. MS cannot use the same input data and same analysis otherwise the update would be pointless - meaning the amount of work needed for creating original and updated AQP is the same. **CZ therefore proposes to harmonise deadline for creating the original and updated AQP in art. 19 and allow at minimum 2 years for establishment. CZ would also support longer periods for establishments since AQP in general falls under the SEA procedure. Based on our experiences, more than 6 month of the 2 year period must be reserved for the SEA procedure.** This gives us less than 1 and ½ year for development of the AQP, making it particularly challenging to meet the 2 year deadline. We point out that the updated AQP might also falls under the SEA procedure, at the very least they are objects of screening procedure within the SEA procedure, which demonstrates how unrealistic is the timeframe associated with the updated AQP proposed in the original COM text (1 year for creation and implementation that in our opinion completely omits the consultations part of the AQP establishment).

B. Air Quality Plans for ozone (Article 19(2))

CZ welcomes the intention of the PRES to include flexibility regarding the territorial units used for ozone AQP. CZ suggests to the PRES to amend the first sentence of the amended art. 19.2 as follows: “...territorial unit covering at least “one” air quality zone...”. This will make the text clearer.

However, **CZ favours the approach of the current AAQD (art. 17 of the 2008/50/EC directive)** meaning that the measures for reducing the ozone precursors are included in the national air pollution control program (NACPC) issued under the NEC directive. We are of the opinion that it is not very practical to deal with ozone precursors on a limited scale of air quality zones. CZ adds that the majority of ozone precursors originate outside the territory of an air quality zone therefore there is limited potential to deal with ozone pollution on a scale of one (or even several) zone(s).

Regarding the amendment of second subparagraph of art. 19.2 as proposed by the PRES, CZ welcomes the inclusion of economic conditions into ozone AQP. CZ would also support including of socio-economic conditions and reflecting these conditions in AQPs for other pollutants as well. We would like to point out that economic conditions were already included in art. 17 of the 2008/50/EC, which is another reason why CZ prefers the approach in the current AAQD when it comes to ozone.

Lastly, CZ also points out that the text proposed by the PRES omits deadlines for the notification of the Commission.

C. Territorial units most appropriate for AERO AQ plans (Article 19(3))

CZ would prefer to establish AQP for exposure reduction obligation for NUTS 1 level, however, we interpret the text proposed by the PRES under option 2 as flexible enough to enable us to do so. Nevertheless, CZ suggests the following change in the first sentence of the text proposed by the PRES: “...territorial unit covering at least “one” NUTS2 level...”

CZ also reiterates that the revised AAQD should aim at minimising the administrative burden on MS therefore we would support solutions decreasing the number of AQP. **We are of the opinion that ozone and AERO measures could be easily incorporated into the NACPC since both ozone and AERO aim at reducing air pollution across large territory (as it is the case for NACPC), so we would welcome to have this possibility explicitly in the text of art. 19.**

Article 22: Public information

CZ views the requirement to have 27 identical indexes throughout the EU as redundant given the fact that EEA has already established very good air quality index for the whole EU territory. MS should not be required to copy the EEA's work. We are of the opinion that it should be sufficient to promote the EEA index on MS level as proposed for example by BE. Overall, we support harmonisation of the Air Quality Index, however, only via the promotion of the EEA's index.

We also support the suggestion of many MS to allow for more flexibility to be able to retain also "national" air quality indexes in the future.

Annex IX: Information to citizens:

CZ could support the third option meaning adding the following into Annex XI point 1a): *"if the measurement method is appropriate for up-to-date data (UTD)"*.

Annex IX (2)(c). Information of possible health effects and recommended behaviour:

CZ suggests to include harmonised information on health effects and recommended behaviour into the EEA's air quality index. CZ does not see further harmonisation of national indexes as necessary. As mentioned above CZ would prefer the approach to consider the EEA's index as the harmonised index and to allow to retain not fully harmonised national indexes that would include health effect and recommended behaviours based on MS individual decisions.

Article 27: Access to justice

CZ reiterates that CZ supports full deletion of art. 27. CZ does not consider the alignment of art. 27 with the IED as satisfactory.

CZ has implemented the Aarhus convention principles into the national legal system, therefore, we see no added value of art. 27. Moreover, CZ listened with great concern to the commentary of the Council legal service relating to the fact that art. 27 is redundant and it could have in fact serious consequences for future disputes concerning the implementation of Aarhus convention in individual MS where it would be the role of the Union to defend MS. Therefore, we do not agree with including art. 27 to the text. In general, we are not in favour of the COM approach of dealing with access to justice on a level of each directive, CZ is of the opinion that access to justice requires horizontal approach.

CZ took notice of the explanation of the COM that not all MS have implemented Aarhus convention successfully. CZ suggests, considering the explanation provided by the Council legal service, to deal with such instances via the Aarhus convention Implementation Committee. We would consider such approach as more suitable and less burdensome for MS that have successfully implemented the convention.

CZ would not oppose to refer to the Aarhus convention in recitals of the revised directive since CZ fulfils all of its obligation under both Aarhus Convention, its implementation, and relevant EU legislation regarding access to justice for "environmental issues".

Article 28: Compensation for damage to human health

CZ provides the following information regarding the 3 topics as requested by the PRES.

1. Scope of the right to compensation (paragraphs 1, 2 and 3): who is entitled to compensation, who is responsible for the damage and for which violations of the Directive (including possible collective action)

CZ is of the opinion that there is unlimited number of people that could be theoretically affected by the damage associated with air pollution. Large number of people could also certainly present medical evidence that they really suffer from serious health issues that were caused or deteriorated due to polluted air. However, there is no way of linking such health damage to a specific time period when a specific act was adopted, implemented or omitted. Nor is it possible to determine whether such health issues would indeed be eliminated by specific act or measures if implemented or adopted. Even in situation where the WHO guidelines are met, the health damage could still occur. Therefore, in order to determine causal link, it would have to be analysed to what extent was the health damage exacerbated by a specific act or its omission or whether it is even possible to eliminate health damage at all via specific act/measure. In collective actions these questions would have to be analysed for every single person that is being represented by NGOs.

CZ points out that the AAQD, unlike IED, is not targeting particular polluters and emission that are undisputedly originating from a specific air pollution source with operating permit. AAQD targets the cumulative effect of unlimited number of polluters that are contributing to the air pollution level. Air pollution level is not affected by one particular act or by one particular polluter not even in the most isolated places or islands. Air pollution level is affected by multiple polluters (national or transboundary), natural sources, by interactions of those two elements and affected by air pollution chemistry and meteorological conditions.

Also, MS cannot be held accountable for pollution arising from industrial activities of relevant polluters. Even more so when these polluters' actions are in accordance with the law and legal requirements also set out on EU level legislation. It is the EU level legislation that sets out the limit values of permitted emission from various range of industrial facilities (IED). Therefore, it is not clear why there are two de facto contradictory EU level legislation. (1) One setting out that emitting pollutants from industrial facilities in amounts that are below prescribed limit values is lawful, justifiable and with no follow-up obligation towards the polluter and (2) the other stating that air pollution consisting of the emissions indicated above is an undesirable state of things and MS should be held accountable for something that happened lawfully and on the basis of the EU law. Moreover, the position of the MS should be weakened under the proposed Art. 28 by limiting the range of legal defence tools applicable. Such approach is absolutely unacceptable for the CZ.

2. Causal link and associated burden of proof (paragraph 4)

Given the above mentioned, CZ is of the opinion that linking the health damage to a specific act/lack thereof is impossible. It is impossible for the public as well as for MS and MS' institutions. If there were litigation under art. 28 in the future, there would be no weaker party. No one would be capable to prove or disprove its case. For this reason, CZ opposes the reversal of the burden of proof. Moreover, we are of the opinion that the AAQD bears no resemblance

to directives dealing with employment process (2006/54/EC) or the equal treatment (2000/43/EC) that the COM mentioned as their inspiration for art. 28. Unlike the two mentioned directives, AAQD is not regulating interactions between 2 easily distinguishable sides with different and mainly contradictory interests. CZ further notes that even in 2000/43/EC and 2006/54/EC directives, there is a clear limitation for the reverse burden of proof since both directives contain the following: *“Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.”*

3. Other rules and procedural elements (paragraphs 5 and 6): guarantee of effectiveness and limitation periods for bringing action.

CZ has not further comments relating to the procedural elements given the absurdity of art. 28.

CZ fully supports the comments made by the Council legal service relating to the art. 28 that highlighted that art. 28 introduces legal uncertainty and non-standard procedures. Such provision is unprecedented in the relevant EU law and it could potentially lead many MS to bankruptcy due to the unlimited number of plaintiffs or have other serious negative effects rather than improving the air quality. Also, it needs to be stated that art. 28 could have potential negative effect on the air quality - the air quality cannot be improved once art. 28 makes it possible to draw all of the financial resources out of the MS budget.

To sum up, CZ does not agree with the presumption of causality implied in the text. The core elements of entitlement for damages known for the system of civil law must be preserved at any cost - 1) action taken by the party taken to the court, 2) existence of damage or harm caused and 3) causal nexus between them. The latter two must be proved by the plaintiff with sufficient and relevant evidentiary material as is the standard practise, otherwise it would cause unprecedented disruption within the system of compensation of damages prescribed by civil law theory and practise. Since art. 28 goes against such principles and since the damage to human health caused by air pollution cannot be linked to a certain act or time period, **CZ ask for full deletion of art. 28.**

Article 29: Penalties.

CZ appreciates the intention of the PRES regarding art. 29, however, the goal of art. 29 is still unclear to us. We noticed the explanation provided by the COM that the aim of art. 29 is to establish qualitative criteria for penalties linked to breaches of air quality measures that are exclusively implemented directly in the national legislation. Given the fact that art. 19 does not require AQP's measures to be legally binding (the measures can be introduced outside the national legislation), we view the broadening of article 29 as redundant since it offers no added value and at the same time interferes with existing penalties system established in national legislation. **CZ therefore prefers the provision relating to penalties established in the current AAQD (art. 30 of the 2008/50/EC directive).**

Annex III.A.2 and Annex IV.B. 2(f) references to Best Available Techniques (BAT):

CZ consider the existing provision of the 2004/107/EC relating to measuring the implementation of BAT at point sources as confusing and unclear. CZ doubts that sampling points measuring in the vicinity of point sources that falls under the BAT conclusions can prove or disprove the effectiveness of BAT since the air pollution level is influenced also by other diffuse or linear air pollution sources nearby, as well as by other factors. **CZ would therefore**

support the third option proposed by PRES and delete the BAT reference from Annex III.

Annex I, section 4. Representativeness of stations for alert threshold exceedances for PM10 and PM2.5

CZ suggests to amend the phrase in question as follows: “...at locations representative, “if appropriate”, of air quality over at least 100 km² or an entire zone, whichever is smaller.”

CZ is of the opinion that such amendment would enable the MS to consider various locations in assessing exceedances of alert thresholds and it would also allow MS to consider hotspots when assessing information/alert thresholds.

Article 15(4) Prediction of the risk of exceeding thresholds:

CZ does not support the PRES proposal aiming at requiring mandatory modelling applications or forecasting tools for detecting exceedances of information or alert thresholds. Generally, we have good experience with air quality modelling of annual concentrations, however, modelling the 3hour concentrations or similar short-term concentrations is exceedingly challenging task with enormous uncertainty which make the results of such modelling inapplicable. CZ therefore supports informing the public only about actual exceedances and therefore adopting short-term action plans based on actual exceedances.

Article 31(1) and Article 32. Transposition and dates for entry into force

We could be flexible on this issue, however, we need to analyse a written proposal for possible amendments of art. 31 and 32.