06.08.2008 007629

Brussels,

EKOLOGICKY PRAVNI SERVICE
Dvorakova 13
602 00 Brno
Czech Republic


Ref.: Your letters of 11 September and 25 October 2007
Your letters of 16 October and 8 November 2007
Your letter of 21 January 2008
Your letters of 14 April 2008 and 6 May 2008
Your letter of 27 May 2008 and e-mail from 25 July 2008

Dear

First of all, I would like to apologise for the delay in answering your request for internal review to the Commission that has adopted Decision C(2007)6367 of 10 December 2007 approving the Operational Programme Transport 2007-2013 for the Czech Republic.


Your request has been the first in terms of Regulation (EC) No 1367/2006 concerning Cohesion Policy and therefore has needed a lot of coordination with other Commission services in order to deal correctly with this kind of request. Unfortunately my services do still not have ultimate certainty on all issues linked to the correct interpretation of Article 10 of Regulation (EC) No 1367/2006.

However, based on the information available to my services so far and taking into consideration your letter of 11 September 2007 addressed to Commissioner Hübner and your letter of 25 October 2007 addressed to Commissioners Hübner, Barrot and Dimas to which I have replied by letters of 16 October and 8 November 2007 already, for the following reasons
I will not propose to the Commission to review its Decision C(2007)6367 adopting the Operational Programme Transport for the Czech Republic:

First of all, the Commission Decision, the review of which you are requesting, does in my view not constitute "an administrative act under environmental law" in the sense of Article 2(g) of that Regulation, as this act, although having "legally binding...effects", has no "external effects". Decisions approving operational programmes are addressed to the Member State, but such decisions do not approve any project to be co-funded under that programme. Operational programmes are setting "a development strategy with a coherent set of priorities", whereas the implementation is under the responsibility and competence of the national authorities. These decisions enable the Commission to make commitments on the Community's budget to complement national actions, integrating into them the priorities of the Community\(^1\). As already clearly set out in our letters of 16 October and 8 November 2007 that strategic approach is implemented in a framework of complementarity, partnership and subsidiarity. I refer explicitly to the content of these two letters which are attached as integral part of this letter.

According to this framework the national authorities are responsible for the implementation of the programme concerning among others the selection of projects in conformity with Community and national legislation, including environmental rules, such as the Environmental Impact Assessment.

Our letter of 8 November 2007 has in addition clearly set out how the concerns of NGO's and/or civil organisations have been reflected in the final version of the programme adopted and I refer to the preamble quoted in that letter.

Secondly, the Commission services agree that even decisions on major projects which constitute an exception to the strategic approach set out above do NOT have "legally binding and external effects" in terms of Regulation (EC) No 1367/2006, as the essential purpose of these decisions is not to approve such major projects (which still remains the competence and responsibility of the national authorities), but to fix the basis on which the Community financial assistance will be made available. Although legally binding (on the Commission), such decisions are not legally binding concerning the project in itself because the Member State remains free to decide whether it will carry out the project in a different manner, albeit with its own resources. This argument applies even more on decisions adopting operational programmes, as they concern a more abstract level of the whole programming exercise than decisions on major projects.

Finally even if the version of the Operational Programme Transport as adopted by Commission Decision C(2007)6367 had been based on a Strategic Environment Assessment established in a way set out in your letter of 21 January 2008, the correct procedure would be to lodge a complaint addressed to the Secretariat General of the Commission to launch an infringement procedure under Article 226 against the Czech Republic for failing to fulfil an obligation under then Treaty by non respecting the SEA Directive and would not be the review of Commission Decision C(2007)6367.

I am sorry that I am not in a position to give a more positive answer to your request. However, when approving individual projects under the Operational Programme Transport for the Czech Republic, the Czech authorities have to respect Environment Impact Assessment Directive and the non respect of that Directive will prevent such projects to be

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\(^2\) Art. 9(1) of Regulation (EC) No 1083/2006.
eligible under the programme. The correct procedure to stop such projects is in the first instance a legal action under national law and secondly a complaint addressed to the Secretariat General of the Commission for breach of Community environmental law.

Once again, please accept my sincere apologies for the delay dealing with your request.

for the Director General absent,
Michele Pasca-Raymondo
Deputy Director General

Dirk AHNER
Director General

Enclosures: 
Annex I
Annex II

Our letter of 16 October 2007
Our letter of 8 November 2007

Copies: 
M. Lemaître,
M. J. Engwegen,
M. R. Goulet,
M. Ch. Grant,
M. N. Hanley,
M. J. Garcia Burgues,
M. Leo Flynn,

Cabinet of Commissioner Ms. Hübner;
Directorate General Regional Policy F.2
Directorate General Regional Policy B.1
Directorate General Regional Policy B.3
Directorate General Environment A.1
Directorate General Environment A.2
Legal Service of the Commission
Subject: Operational Program "Transport" in Czech Republic

Ref.: Your letter of 11 September 2007, sent to Commissionaire Mrs Hübner

Dear Mr. Hübner,

On behalf of the Commissionaire Mrs Hübner, I would like to thank you for your letter of 11 September with the supplement to a complaint you have already introduced in the context of the procedure followed by the Czech authorities for the SEA assessment for the adoption of the OP Transport.

As your complaint is currently under examination by the DG Environment, I cannot pre-empt the result of this process.

As regards the process for the approval of the Operational Program Transport, assistance under the Structural Funds is provided according to an approach of complementarity and partnership between the Commission and the Member States, with due regard for their respective powers. On the basis of the principle of subsidiarity the implementation of co-financed actions is the responsibility of the Member States at the appropriate territorial level and according to their institutional system (Article 12 of Regulation (EC) No 1083/2006).

The approval of any project mentioned in the OP Transport (including those indicated in the appendices), should be subject of examination by the Managing Authority of the OP Transport on the basis of the principles laid down in the programming documents adopted by the Commission and in conformity with Community and national legislation, including State aid and environmental rules. This includes also the Environmental Impact Assessment (EIA) and the Cost-Benefit (C/B) analysis which should contain a comparison, from an economic and environmental point of view, of alternative routing options.

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390 01 Tábor
Česká republika
In conclusion, because of the ongoing examination of your complaint, the Commission cannot, for the time being, take position on the points of substance which you mentioned in your letter. However, I can assure you that my services will be very vigilant as regards the respect of all environmental, economic and TEN requirements in connection to the OP Transport and in particular in the projects selection procedure.

Sincerely yours,

[Signature]

Dirk Ahner

for the Director General absent,
Michele Pasca-Raymondo
Deputy Director General

Copy: Cabinets of the Commissionaires Mrs Hübner, Mr Barrot and Mr Dimas
Subject: Operational Program “Transport” in Czech Republic

Ref: Your letter of 25 October 2007, sent to the Commissionaires Mrs. Hübner, Mr. Barrot and Mr. Dimas

Dear Sirs,

On behalf of the Commissionaires Mrs Hübner, Mr. Barrot and Mr. Dimas, I would like to thank you for your letter of 21 October 2007 regarding approval of specific major transport projects in the context of the OP Transport for the 2007-2013 programming period.

On this issue, please note that the purpose of the Operational Programs is to set the overall strategy for the utilization of EU Funds in the Financial Perspective 2007-2013. On that respect, assistance under the Structural Funds is provided according to an approach of complementarity and partnership between the Commission and the Member States, with due regard for their respective powers. In this context, and on the basis of the principle of subsidiarity, the implementation of co-financed actions is the responsibility of the Member States, at the most appropriate territorial level and according to the institutional system of each Member State (Article 12 of Regulation (EC) No 1083/2006).

Environmental Law Service (EFS)
Dvorskova 13, 60200 Brno
Czech Republic

CEE Bankwatch Network National Coordinator
Hnutí DUHA – Friends of the Earth Czech Republic
Lublanska 18, 12000 Praha 2
Czech Republic

OEKOBUBRO, Austria: in the name of Greenpeace CEE and Global 2000
Volksgartenstr.1, A-1010 Wien
Austria

G/Czech Republic Structural Funds/2007-2013/OP Transport/COMPLAINTS/Reply of Mr. Ahner to __..dco
This means, in particular, that the European Commission may not intervene in the choice of the projects nor in the definition of the projects' alignment, as this comes under the exclusive competence of the national authorities, provided that their choices are in line with the principles laid down in the programming documents adopted in consultation with the Commission, and that they comply with Community and national legislation, including State aid and environmental rules.

Against this background, and taking into account several other comments of NGOs and/or civil associations, the final version of the OP Transport submitted by the Czech Authorities on 12 October 2007, following the negotiations held in Prague on 20 September 2007, now includes the following preamble:

"The list of projects in Appendix 1 and the schemes in Appendix 2 are to be considered as indicative. These projects and their configuration (specific line routings, e.g.) could be amended and changed during the programming period. Approval to co-finance any project mentioned in the OP Transport and in the appendices, will be subject to the examination of his application for co-financing by the Managing Authority of the OP Transport, including the Environmental Impact Assessment (EIA) and the Cost-Benefit (C/B) analysis which should contain, inter alia, comparison of alternative options on the basis of their cost and environmental aspects in line with the "letter and spirit" of the relevant Community legislation. The findings of the comparative studies of the examined alternative alignments, both from an economic and environmental point of view, will be part of the formal application for the co-financing of the projects. It should finally be stated that approval of the operational programme and approval of financial support for individual projects are two separate processes and therefore the decision of the European Commission on the programme approval does not prejudge the approval of cofinancing for any individual project".

We welcome this development and I can assure you that my services will be very vigilant as regards the respect of all environmental, economic and TEN requirements in connection to the OP Transport and in particular in the projects selection procedure.

Sincerely yours,

for the Director General absent,
Michele Pasca-Raymond
Deputy Director General

Dirk Ahner

Copy: Cabinets of the Commissionaires Mrs Hübner, Mr Barrot and Mr Dimas