I. Information on correspondent submitting the communication

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II. State concerned

CZECH REPUBLIC

III. Facts of the communication

1. Reasons that lead to this communication and general legislative background

1. This communication concerns failures of the Czech Republic to introduce the necessary legislative, regulatory and other measures to fully implement the requirements of Art 9 par 2, 3 and 4 of the Convention. With respect to the alleged non-compliance concerning Art. 9 par. 2, also some deficiencies related to Art. 6 (par 3 and 8) are mentioned.

2. The communicant is convinced that legislation and court practice of the Czech Republic fail to meet a number of specific requirements of these provisions of the Convention, as described in detail below. It should be emphasized that **no specific provisions or**

legislative acts were adopted with explicit intention to implement the requirements of Art 9 par 3 and 4 of the Convention.

3. The Aarhus Convention was ratified by the Czech Republic on July 6, 2004. It has been in force from October 4, 2004 (published under no. 124/2004 Coll. of international treaties).

4. The main reason of submitting this communication is the fact that more than 5 years after the ratification of the Convention, the status of compliance with its access to justice pillar does not seem to improve considerably in the Czech Republic, despite of the fact that most of the problems raised in this complaint were repeatedly described[1] and notified to the national authorities.

5. Before discussing the specific contradictions (non-compliances) according to the respective provisions of the Convention, some general aspects of the Czech legal system, relevant for all parts of the complaint, are summarized. The communicant believes that this could be practical for better overall understanding of the critical issues.

1.1 General model of standing (impairment of right doctrine)

6. Czech legislation does not contain any definition of the "**public concerned**" (there is has been no direct transposition of Art. 2 par 5 of the Aarhus Convention). Subsequently, the Czech law does not distinguish between the standing requirements of individual paragraphs of Art. 9 of the Aarhus Convention, namely between par 2 and par 3. .

7. Generally, in both administrative and civil judiciary the standing conditions in the Czech Republic are based on doctrine of "**infringement of rights**" that has derived from the Austrian/German administrative system.[2]

8. In the area of court review of administrative acts, which can be considered as the most important for environmental protection, the standing rights are generally regulated by art. 65 of the Act No 150/2002 Coll., Code of Administrative Justice. This provision grants standing to start a review procedure of acts of administrative authorities to
   a) persons whose rights or obligations were "created, changed, nullified or bindingly determined by the act", or
   b) other parties to administrative proceedings who assert that their rights have been infringed in these proceedings (and this could cause illegality of the final act)

9. The wording of this "general standing provision" of administrative justice, as well as it's common interpretation by the Czech courts, leads to the conclusion that access to review procedures of administrative acts at court is (also in environmental cases) granted only to persons "**maintaining impairment of a right**."

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[1] See e.g. the studies concerning situation in the Czech included in the analyses prepared by the Justice & Environment network in 2006 (http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Aarhuslegalanalysis.pdf - pp 46-58) and in 2009 (http://www.justiceandenvironment.org/wp-content/uploads/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf - pp 46-58).

[2] See aslo e.g revised communication Austria ACCC-C-2010/48 Austria, para 12 http://www.unece.org/env/pp/compliance/C2010-48/Communication/C48_Revisedcommunication_June2010.pdf, or Černý, P., Practical application of Article 9 of the Aarhus Convention in EU countries: Some comparative remarks. ELNI review 2/2009, page 74 et seqq.

10. In practice, the possibility of starting a review procedure at court is mostly pre-determined by **previous participation** in the relevant administrative procedure (i.e. it is only possible for the persons with status of a party to the administrative procedure). With one recent exception concerning the EIA procedures, this fully applies also on standing of the environmental NGOs (see part 2.2. for details). In most of the administrative procedures with environmental aspects, it is not difficult for an NGO to obtain a status of a party, if meeting some formal (not too complicated or difficult) requirements. Consequently the NGOs can ask for the court review of the decisions (permits) issued in such procedures, however, but mostly only in a limited manner (see part 2.2)..

11. Furthermore, there are procedures relevant for the environmental protection in which the members of the public concerned cannot participate and therefore they also have to access to court review procedures.

1.2 EIA procedure and fragmented system of environmental permits

12. In the Czech system, the EIA procedure (regulated by Act no. 100/2001 Coll.) is not an integral part of environmental development consent (decision-making) procedures, but a separate process finalized by issuing an "EIA statement". This "**EIA statement**" does not have the character of a binding permit (development consent). It is an **obligatory base for subsequent decision-making procedures**, which must be reflected (but not necessarily respected) in the development consent decisions.

13. As regards the possibilities of public participation, the EIA procedure "as such" is fully open to the public. All information about the assessment procedure and relevant documentation is published and everyone is entitled to make comments to it in the relevant phases of the EIA process. However, due to the fact that EIA procedure is separated from the subsequent decision-making procedures, the openness of the EIA procedure for public participation *per se* is not sufficient for meting all the requirements of the Aarhus Convention concerning public participation in decisions of specific activities (namely the requirements according to Art 6 par 3 and Art. 6 par. 8). Consequently, and in combination with other aspects of the Czech legal system, it is also not by itself fulfilling the commitments related to Art. 9 par. 2 of the Convention.[3]

14. For most investments with environmental impacts (regardless if they are subject to EIA or not) the investor needs a number of **separate permits**[4]. It can be therefore said that the Czech system of environmental permitting is considerably fragmented. The most important and/or most frequent permits are issued according to the 183/2006 Coll. **Building Act** (namely land use permits and building permits – see part 2.1 below), 114/1992 Coll. **Nature Protection Act**, 254/2001 Coll. **Water Protection Act**, 86/2002 Coll. **Air Protection Act**, 76/2002

[3] Similarly, not all requirements of Art. 6, 8, 9 and 10a of the EU EIA Directive are met by the Czech EIA Act as such. Due to the concept of the EIA process separated from the consequent decision-making procedures, also other acts regulating the subsequent administrative processes must also be considered as transposition norm with regard to the EIA Directive. For more details, see the EIA analysis for the Czech Republic in the Justice & Environment collection of legal analyses at http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006EITlegalanalysis.pdf (pp 32-34)

[4] Even in cases where the permit according to the 76/2002 Coll. IPPC Act is issued, it integrates only part of the permits an the other are still issued separately.

Coll. **IPPC Act**, 44/1988 Coll. **Mining Act**, 258/2001 Coll. **Public Health Protection Act**, 18/1997 **Nuclear Act**.

15. At the same time, there are **different rules regulating which subjects have a position of a party in individual decision-making procedures** according to the respective laws. General definition of a party to administrative procedure is contained in Art. 27 of the **Administrative Procedure Code** - Act no. 500/2004 Coll. According to this provision, position of a party of an administrative procedure is granted to
    - the person(s) who submitted the request for a permit (applicant - a developer in environmental cases),
    - in the procedures initiated *ex officio*, persons whom the decision shall create, abolish or alter their rights and duties,
    - **other persons concerned "as far as their rights or duties can be directly affected by the administrative decision"** (accented by the communicant),
    - persons to whom a special act stipulated the position of a party.

16. This general provision of the Administrative Procedure Code is, at least in theory, general enough for interpretation consistent with the requirements of Art. 6, Art. 9 par 2 and Art. 9 par 3 of the Aarhus Convention. It applies – exclusively or in combination with complementing provisions of special acts in most of environmental decision making procedures[5] (both subject to Art. 6 of the Convention ant others).

17. However, there are **other procedures** (some of them very important for the protection of environments and related rights of affected subjects), **in which an exclusive and more restrictive regulation of who has position of a party applies**. This concerns namely procedures according to the 183/2006 Coll. Building Act and results in non compliance with some of the provisions of Art. 6 and also of Art. 9 par 2 in these procedures (see part 2.1 below).

1.3 Position of the Aarhus Convention in the Czech legal system

18. Art 1 par 2 of the Czech Constitution determines that the Czech Republic "*shall observe its obligations under international law*". According to Art. 10 of the Constitution, "*promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding for the Czech Republic, shall constitute a part of the legal order; should an international agreement make a provision contrary to a law, the international agreement shall be applied*".

19. According to legal theory and jurisprudence, for direct application of international agreements there are two other conditions for direct application of the international agreement instead of (prior to) national legislation which is not in compliance with it: they must be "sufficiently specific" and "grant specific rights" to private persons.

20. Czech Courts referred to the Aarhus Convention in some of their decisions. In most of them, they came to the conclusion that the Convention in general, or some of the provisions it contains, are not directly applicable, as they are not "sufficiently specific"

[5] This concerns namely procedures according to 114/1992 Coll. Nature Protection Act, 254/2001 Coll. Water Protection Act, 86/2002 Coll. Air Protection Act, 76/2002 Coll. IPPC Act.

and it "only constitutes general obligations for the national authorities". On the other hand, in some of the decisions (mostly referring to the general provision of Art 1 par 2 of the Constitution, as mentioned above), the courts emphasized that national laws must be interpreted consistently with the international obligations arising out of the Convention (regardless if it is directly applicable or not). Relevant court decisions are described in more details and/or quoted in the respective parts of this complaint below.

2. Non compliance with Article 9 par 2 (in relation with Article 6 par 3 and 8)

21. With regard to Art. 9 par 2, there are, according to the communicant, three major areas of non-compliance of the Czech Republic with the requirements of the Convention. **The first one** concerns the **too restrictive definition of parties of some important environmental decision-making procedures**, which prevents some members of the public concerned from access to the review procedures (this related also with come non-compliances with requirements of Art. 6). **Secondly**, the environmental **NGOs are limited in their right for review of substantive legality of the environmental permits** by the restrictive case-law of the Czech courts. And **finally**, there is a "gap" in the Czech legislation which causes that **some administrative omissions which related to the activities according to Annex I of the Convention are excluded from the possibility of judicial review**.

2.1 Limited standing of natural persons (individuals) with regard to the land use and building permits

22. As described above in part 1.2, various permits are in most cases issued for a project which can have significant effect on the environment according to the Czech legislation. This applies also on the projects (activities) which fall under the scope of Art. 6 of the Aarhus Convention.

23. In the Czech legal system, the most important permits (development consents) for most activities subject to Art. 6 of the Aarhus Convention (e.g. industrial installations, traffic constructions, landfills, dams etc.) are issued according to the **Building Act** (Act.no.183/2006 Coll.). These are namely the **land use permits** and **building permits**. The first one definitely delimitates a territory for a proposed activity.[6] The second one is the final permit which enables the developer to starts realizing the investment.

24. The Building Code includes autonomous definitions of parties of the procedures for issuing the land use and building permits (which prevents application of the general provision of the Administrative Procedure Code – see part 1.2 above). According to these definitions, the only individuals who can be parties of the decision-making procedures for issuing the land use and building permits are "persons, whose **property rights or another right *in rem* to the neighbouring buildings or grounds** (accented by the communicant) may be directly affected by the permit" (i. e. "the neighbours"). Other individuals (members of the public concerned), likely to be affected by these permits in other than property rights (e.g. right for protection of the health of right for favorable environment, which are both granted by the Czech Constitution[7]), are omitted. They cannot act as

[6] Therefore, it should be, in my opinion, considered as a "main decision", in the sense of the ECJ case law (Delena Wells, C-201/02, point 52, or Diane Barker, C-290/03, points 47. and 48.).

[7] See Art 31 and Art 35 of the Charter of basic rights a freedoms.

parties of the land use permit and building permit procedures.

25. This fact prevents, firstly, the affected individuals, distinct form the property owners, from the possibility to exercise some of the rights granted by Art. 6 of the Aarhus Convention. Indeed, as described above in part 1.2, they can participate in the EIA procedure for an investment (which is open for everyone). By that means, they have access to information about the project and can submit their comments. However, as EIA is not a part of the decision-making (permitting) procedures (as also described above), they cannot "*participate effectively during the environmental decision-making*", as Art. 6 par 3 of the Convention requires. **Only participation in the decision making procedure as such, with the status and procedural rights of a party, can be considered as "effective participation" in the Czech system**.

26. Similarly, despite Art. 6 par 8 requires the Parties to the Convention that "*in the decision due account is taken of the outcome of the public participation*" it is not so in the Czech system. Again, the affected individuals, distinct form the property owners have no procedural guarantees that their comments raised during the EIA procedure will be taken into account in the decision making procedures for issuing the land use permits and building permits).

27. **It can be therefore concluded that the Czech legislation regulating decision-making procedures according to the Building Act is not in compliance with Art. 6 par. 3 and Art. 6 par. 8 of the Aarhus Convention**. It stipulates the rights according to these provisions only to limited number of individuals (the neigbours), while other individuals falling into the scope of the "public concerned" are omitted.

28. As mentioned above, only the persons with the legal status of a party to the administrative procedure have in practice access to court review of the respective decisions (standing). Consequently, only the "neighbours" (persons whose property rights to the neighbouring buildings or grounds) have access to court review of the decisions (land use permits and building permits) issued according to the Building Act.

29. **With regard to the activities and related decisions (permits), which are subject to the provisions of Art. 6 of the Convention, this situation is not in compliance with its Art. 9 par 2**, which stipulates that members of the public concerned shall have access review procedures before court on condition that
    a) they have sufficient interest, or, alternatively, if the procedural law of a Party requires this
    b) they maintain the impairment of a right.

30. The Czech legislation goes, however beyond these conditions, as it limits the scope of members of public concerned, who have access to court review of the decisions according to the Building Act (land use and building permits), in a way that only maintaining the impairment of some property rights can be basis for it.

31. **The communicant therefore claims that the legislation of the Czech Republic is not in full compliance with Art. 9 par 2 of the Convention, as the scope of members of public (individuals) who have access to the court review procedure of the most**

important environmental permits is too restrictive compared to the requirements of the Convention. The communicant adds that according to the accessible information, this situation is currently subject to an infringement procedure against Czech Republic started by European Commission for insufficient transposition of art. 10a of the EIA directive (ECJ case C-378/09).

2.2 Limited scope of the judicial review of the NGOs lawsuits

32. With one exception which will be discussed later in this section, the access of the non-governmental organizations meeting the requirements referred to in Art. 2 par 5 of the Aarhus Convention (NGOs) to the court review of the environmental permits depends on their previous position as parties to the administrative proceedings. With regard to the procedures subject to Art. 6 of the Convention, it is in most cases relatively easy for the NGOs to meet the requirements of national law for obtaining a position of a party of such procedures.[8] Consequently, the NGOs which had status of parties of administrative procedures have access to the court review of the environmental decisions in the scope of Art. 9 par. 2 of the Convention.

33. The position of the NGOs before courts is, however, strongly influenced and weakened by the above mentioned doctrine of "maintaining impairment of a right", which the Czech courts apply. **In accordance with this doctrine, NGOs can only successfully enforce court protection against intervention into their procedural rights in the decision-making procedure**, **as these are the only "subjective rights" they can have in the environmental procedures**. It means that the NGOs can ask the court to review if they could see all the documents related to the environmental permit, if they had enough time to study them and express their opinion, if they were invited to the public hearing etc. However, they cannot claim that the decision breaches the requirements of environmental laws (e.g. limits of emissions or provisions prohibiting some activities in protected areas), as this is not related to any of their "personal rights".

34. This approach is further based on the case law of the Czech Constitutional Court, according to which **NGOs cannot claim a right for a favorable environment**, as it can "self-evidently" belong only to natural, not legal persons. [9]

35. The specific application of this approach is very different in individual cases. The courts have in fact dealt with the "substantive" objections of the NGOs and reviewed the substantive legality of the decision in question (at least to some extent) in quite many

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[8] Most frequently, the NGOs use Art. 70 of the 114/1992 Coll. Nature Protection Act to obtain status of the parties of environmentally relevant administrative procedures.. The provision is applicable not only for the procedures according to the Nature Protection Act, but for all procedures when "interests of nature conservation and landscape protection" are affected by the project (i.e. not "interests of environmental protection", which is a broader term). This formulation makes it possible for NGOs to use the provision to become parties also of e.g. the land use permit procedures. On the other side, it can also be interpreted restrictively in some cases. There are similar provisions in the Water Protection Act and IPPC Act (for procedures performed according to them). Another possibility for NGOs is to participate in the EIA procedure (which itself is not a development consent procedure - see above) and consecutively, according to Art. 23. 9 of EIA Act, to obtain the right to participate in subsequent development consent procedures.

[9] At the first time, the Constitutional Court expressed this view in its Decision dated 6 January 1998, ref. no. I. ÚS 282/97.

cases. They have often explained or "justified" it in the way that there is a relation between the substantive arguments in the lawsuit and breach of the NGO subjective (procedural) right that all the comments and objections it made during the administrative procedure should be dealt with and answered properly by the administrative authority.

36. On the other hand, there are even very recent decisions in which courts applied a very restrictive approach to the NGOs lawsuits and the arguments contained in them. The courts refused to deal with the NGOs arguments concerning e.g. not meeting the conditions for permitting logging of the trees, alternatives of the investments or compensations for damaging the environment.

Case example 1: Scope of "admissible NGO arguments"

A local NGOs asked the court to review a building permit for an approach road to the industrial zone. It argued e.g. that the project was not assessed in the EIA procedure, although it should have been, and that the impact of the project on the Natura 2000 area was evaluated wrongly.

The District Court of Ústí nad Labem rejected the lawsuit. With respected to the above mentioned arguments, the court dismissed to consider them, arguing that they relate to application of the substantive laws, while the plaintiff (NGO) is only entitled to claim infringements of it's procedural rights before court. The court can only review if the administrative dealt with the objections of the NGO sufficiently, but not to review the objections from the merit.

The NGO filed a complaint against this decision arguing that through participation of the NGOs in environmental development consent procedures their members protect their (substantive) right for favorable environment (granted by the Czech Constitution). It also referred to the Aarhus Convention which grants right to challenge also substantive legality of the acts related to the environment for public concerned (including NGOs).

The SAC rejected the complaint and confirmed the position of the 1st stage court, that environmental NGOs "can only successfully claim for judicial protection against infringements of their own, i.e. procedural rights. Therefore, according to SAC, it cannot claim infringement of the right for favorable environment (neither it's own nor for the members).[10]

37. Under the pressure of all these circumstances NGOs are often basing their suits on the assertion that their right to a fair trial has been infringed, although the real aim of the suit is the protection of environment. Both claimants and courts are therefore focusing on the procedural errors of administrative bodies more than on the essence of the dispute itself. One result of this is that NGOs are being accused of obstructions and formalism (instead of protecting the environment).

[10] Decision dated 16 July 2008, ref. no. 8 As 35/2007-92. Similar opinions are expressed also i.a. in the SAC decisions dated 7 December 2005, ref. no. 3 As 8/2005-118, 11 December 2008, ref. no. 8 As 35/2008-97 or 22 July 2009, ref. no. 5 As 53/2008-243. In the last from these decisions, the SAC concluded i.a. that environmental NGO cannot make objections concerning protection against noise .

38. It must be added that in December 2009, an amendment of the 100/2001 Coll. EIA Act was adopted as a reaction on the infringement procedure started against the Czech Republic by European Commission (ECJ case C-378/09, mentioned in the previous part 2.1.). The amendment (a single provision – new Art 23 par 10 of the EIA Act) states that environmental NGOs which submitted comments in the EIA process, have the right to initiate a review procedure before the court against the development consent decision, issued after the environmental assessment procedure. It means that the NGOs, if meeting the condition as mentioned, can challenge the development consent decision, even if it was not a party of the preceding administrative procedure.

39. This amendment, however, causes very little – if any – change of the current situation. As described above, it is possible for NGOs, also under current legislation, to become parties of the development consent procedures subsequent to EIA and consequently to ask for judicial review of the development consent decisions. It is therefore very unlikely NGOs would make use of this new provision. It is also not likely that this amendment in itself would change the way in which the courts apply the "impairment of right doctrine" towards the NGO lawsuits. Moreover, this new provision explicitly states that if an NGO files a lawsuit according to it, there is no possibility for the court to issue an injunctive relief (see part below part 4.2. for more details).

40. **The communicant therefore concludes that the Czech Republic fails to implement correctly the requirement of Art. 9 par 2 of the Convention, according to which members of the public concerned shall have right to challenge both substantive and procedural legality of the decisions subject to Art. 6, with regard to the lawsuits of the NGOs.**

2.3 No right to review omissions of administrative authorities in case they fail to start the procedure

41. Art. 9 par 2 of the Aarhus Convention explicitly stipulates that members of the public concerned shall have access to the review procedures at court not only with regard to acts and decisions, but also omissions of the administrative authorities. The Czech legislation includes the possibility of judicial protection in administrative omissions in Art .79 of the CAJ, which states that a person who has ineffectively exhausted the administrative measures for the protection against the inaction of an administrative authority "may request that the court obliges the administrative authority to issue a decision on the merits of the matter".

42. There is, however, a significant "gap" in this regulation (as interpreted by the Czech administrative courts), which leads to the conclusion that no person can initiate a review procedure at in situations when the authority fails to start the procedure *ex officio*, under occasions when a law asks it to do so (for example, if an investor builds a structure or starts an operation without the necessary permit).

43. In such event, the affected person can ask the superior administrative authority to take a remedy. However, if also the superior authority fails to do so, the courts cannot order the passive authority to act (start the procedure). The SAC confirmed this interpretation in a number of its decisions.

Case example 2: omission of the building office to protest a historical building

One of the part owners of a historical (protected) building pursued construction works on the building without consent of other part owners and without a building permit. The part owners asked a building office to order removing the construction works, what the building office rejected.

The part owners therefore asked a court to protect them against illegal omission of the building office. The courts (including SAC) have, however, refused the claim stating that according to the Czech law, the courts do not have power to order an administrative authority to start a procedure on removal of an unpermitted building or construction works, or any other procedure *ex officio*. Courts only can order an authority to pass a decision, when a claimant has a power to formally initiate a procedure (by an application) and the authority fails to issue a decision within a time limit. On the contrary, according to the SAC interpretation, there is no right for judicial protection for persons who are only entitled to make an impulse to start an *ex officio* procedure.[11]

44. The SAC case law does not take into account, that lack of effective remedies against omissions of administrative authorities in this kind of cases can lead to serious infringements of rights of the affected persons and that it is not in compliance with the requirements of Art. 9 of the Aarhus Convention (both par 2 and 3, as the case law fully applies also on the activities listed in Annex I of the Convention and therefore subject to its Art. 6 and 9 par 2).

45. **The communicant is therefore convinced that the Czech Republic is not in compliance with the requirement of Art. 9 par 2 of the Convention to ensure access to the court review of administrative omissions.**

3. Non compliance with Article 9 par 3

46. As already mentioned in part 1.1, Czech law does not distinguish between the standing requirements of individual paragraphs of Art. 9 of the Aarhus Convention. There was also no direct transposition of Art. 9 par. 3 of the Convention. The non-compliances described in the previous section 2. therefore can be considered also as referring to paragraph 3 of Art. 9.

47. Next to that, two specific problems are discussed in this section: The fact that the legislation makes it impossible for the members of the public concerned to participate in some of the environmental procedures, and therefore also to ask for the court review of the related permits[12], and secondly, the limited scope of the affected persons with right to ask for review of the land use plans (including no access to court for the NGOs in such cases).

[11] Decision dated 29 May 2008, ref. no. 2 Ans 2/2008-57. Similar opinion is expressed also in the SAC decisions dated 21 June 2006 ref. no. 4 Ans 7/2005-74, 26 June 2007, ref. no. 4 Ans 10/2006-59 or 23 March 2009, ref. no. 2 Ans 1/2008-84

[12] As described above standing in the administrative procedure is the pre-condition for access to justice.

3.1 Some acts and omissions are completely excluded from the possibility of the court review

48. As already described in parts 1.2 and 2.1 above, the Czech system of environmental decision-making is fragmented. There are therefore usually more permits needed for a project to be realized. In theory, all such decisions (permits) which shall be considered as establishing right of the investor and at the same time influencing rights and legal interests of other affected persons. As such, they shall be subject to the judicial review.

49. **In practice, however, the scope "really reviewable" acts is influenced by the diverse regulation of the parties of the respective decision-making procedures**, which predetermines the scope of potential plaintiffs. With regard to some of the procedures, the laws explicitly state that only the applicant (i.e. the investor) has the position of a party. Consequently, only the applicant has standing to sue the decision. If the applicant is satisfied with it, there is no other subject who could ask the court to review the legality of the decision.

50. This situation exists for example with regard to the "noise exceptions" – decisions which authorize an operator of a source of noise which is exceeding the maximum limits to continue with the operations for a limited period of time (however, with possibility of repeated prolongation). According to Art. 94 par 2 of the Public Health Protection Act (258/2000 Coll.), only an applicant is a party of an administrative procedure on the request for the exception. As a result, the persons whose rights are affected (sometimes very strongly infringed) by the noise exceeding the limits have no possibility to influence if the exception will be issued or not, eventually under which conditions. In practice they also do not have access to judicial procedure to challenge the decision about the exception. As far as the communicant is informed, no lawsuit of an affected person against such decision has ever been accepted by administrative court as admissible.

51. Another example of such situation are the permits issued according to the Act no.18/1997 Coll., "On Peaceful Exploitation of Nuclear Energy (Nuclear Act). In Art 14 par 1, this act stipulates that an applicant is the only party to the administrative procedures exercised according to it. These procedures are listed in Art. 9 of the Nuclear Act and include e.g. approval of the State Agency for Nuclear Safety with building or starting operations of nuclear facilities and of dumping grounds of nuclear waste. Again, the persons whose rights potentially affected by such activities have no possibility to influence issuing the permits, nor they have access to judicial review. The same applies for the environmental NGOs. The courts, including the SAC, concluded that as NGOs can participate in other decision-making procedures which must take place before starting the operations, it is not necessary that they would also have right to participate in the procedures according to the Nuclear Act and access to the court review of their outcomes.[13]

52. Yet another example of legally identical situation is a procedure and subsequent decision on delimitation of so called "protected area of natural resources" according to art. 17 of the Mining Act (44/1998 Coll.). Also according to this provision (par 3), only the applicant has status of party of such procedure.

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[13] SAC decision dated 9 October 2009, ref. no. 2 As 13/2006-110.

53. **The communciant therefore claims that the legislation of the Czech Republic is not in full compliance with Art. 9 par 3 of the Convention, as it effectively prevents any person (member of the public) from access to review procedures of some important administrative acts and omissions related to the environment.** It should be added that some of these acts and omissions can in practice be considered as falling into the scope of Art. 9 par 2 of the Convention, as they can relate to the activities listed in its Annex I (e.g Nuclear Power Plants).

3.2 Limited access to judicial review of the land use plans

54. Since 2005, the Czech law provides for judicial review of so called "measures of a general nature", i.a. of the land use plans (Art. 101a-101d of the Act no 150/2002 Coll., Code of Administrative Justice. This can be considered as one of the most effective legal instrument of judicial protection of the environment and related rights of affected persons, as it applies to the early stage of the decision-making and at the same time, there is a strict deadline for a court to decide in such cases. The efficiency of this institute has been repeatedly confirmed in practice.

55. Despite of that, the communicant is convinced that the legislative regulation and court practice concerning conditions for access to judicial review of the land use plans is too restrictive, considering the requirements of the Aarhus Convention.

56. Art. 101a par 1 of Act 150/2002 Coll. states that an action to challenge a measure of a general nature (i.e. also a land use plan) can be filed by anyone asserting that his/her rights were infringed by the measure (land use plan) in question. This provision seems to be general enough to be interpreted in compliance with Art. 9 par 3 of the Aarhus Convention.

57. The SAC has, however, developed a case law according to which only persons, whose property rights or another right *in rem* to the neighbouring buildings or grounds can have standing to sue the land use plans. The SAC has thus applied the principles concerning definition of parties in the decision-making procedures according to the Building Code (see part 2.1 above) also on the judicial review of the land use plans, despite the literal interpretation of the relevant legislation shall not lead to this conclusion. As a result, also in this area, individuals (members of the public concerned), likely to be affected by adoption of a land use plan in other than property rights cannot ask for the court review of such plans.[14] This counts in particular for plans and programmes falling under Article 7 of the Convention.

58. **At the same time, the SAC repeatedly dismissed the lawsuits of the environmental NGOs against land use plans, as the Czech legislation does not establish their right to challenge these acts at courts**. The SAC explicitly pointed out with that regard that as the Aarhus Convention "is not a directly applicable international treaty", the NGO cannot claim standing (directly) on the base of this Convention.[15] In that context, the findings of

[14] The most important, with that regard, is decision of so called "Extended Senate" of the SAC dated 21 July 2009, ref. no. 1 Ao 1/2009-120.

[15] The SAC expressed this opinion in decisions dated 24 January 2007 ref. no. 3 Ao 2/2007-42, dated 28 May

the Compliance Committee in the 2005/11 (Belgium) case[16] can be mentioned. The Compliance Committee concluded, with regard to the judicial review of the land use (town) plans, that "the Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental NGOs from challenging acts or omissions that contravene national law relating to the environment" (par 35).

59. **The communicant is therefore convinced that the Czech Republic is not in full compliance with Art. 9 par 3 of the Convention with regard to the access to judicial review of the land use plans.**

4. Non compliance with Article 9 par 4

60. In this part, the reasons which cause non compliance of the Czech Republic with the requirements of Art. 9 par 4 of the Convention are described. This concerns namely the legislative conditions and court practice concerning conditions for issuing the preliminary measures (injunctive relieves). Next to that, also the fact that direct review of the EIA final statements and screening decisions is not possible contributes to the inefficiency of judicial protection of the environment in the Czech Republic.

4.1 Restrictive limits for granting the injunctive relief – non efficient judicial protection

61. The Czech procedural norms regulating court procedures do not generally contain any deadlines for the decisions (the review procedure of the "measures of a general nature", including the land use plans, is an exception – see previous part). Proceedings in the civil and administrative judiciary (in one level) last from a few months to several years.

62. The submission of a lawsuit against a decision of an administrative authority generally does not have a suspensive effect. The court may acknowledge it in accordance with Art 73 par. 2 of the Code of Administrative Procedure at the request of the claimant, but only under following conditions, that are usually hard to meet:
    - the claimant must prove that "enforcement or other legal consequences of the decision would cause him/her an "irreparable harm"
    - the acknowledgement of the suspensive effect would not "in a disproportionate manner" affect the vested rights of third parties, and
    - it is not in conflict with the public interest.

63. The courts interpret these conditions – in general – rather restrictively. They use to stress that the harm must be really "irreparable" – i.e. "very serious" – and it must be directly related to the rights of the claimant. Concerning the public interests, the courts sometimes tend to say "if the responsible authorities approved the action in question, than we have to consider it to be in the public interest".

2009 ref. no. 6 Ao 3/2007-116, and dated 13 August 2009, ref. no 9 Ao 1/2008 – 34.

[16] ECE/MP.PP/C.1/2006/4/Add.2

64. A preliminary injunction is regulated by § 38 of the Code of Administrative Procedure. The conditions seem to be less strict than for granting suspensive effect to the lawsuit: There must be only threat of "serious" (and not "irreparable") harm, and it is not necessary that it is the claimant personally who is under this threat. The court may, under these conditions, order to the parties of the dispute, or even to third person "if it is just to do so", to make something, abstain from something or endure something. Nevertheless, it is very rare that an administrative court would issue a preliminary injunction (in civil cases this it happens much more often).

65. For most investments, the land use permits are the most important development consent decisions (see also part 2.1 above). It is not possible to start with the activity (building) on the base of the land use permit (another "building permit" is necessary), but the main question if the investment is possible or not, from the legal point of view, is decided by them.

66. **With regard to these important decisions, the crucial problem with the injunctive relief is that according to the constant case law**[17], **the first and crucial condition of suspensive effect – the threat of "irreparable harm" - can never be met**. The argument is, that – as mentioned before – the investor cannot directly start building after the land use permit is issued. And therefore, the courts say, there is no possibility of any "harm" caused by the land use permit at all. Only the subsequent decisions, which enable the investor to start with building, can directly lead to the harm.

67. Individuals affected by building permits sometimes succeed with the requests for suspensive effect of the lawsuit (e.g. on the basis of an expert statement proving they are in a threat of damages on their property).

68. The position of NGOs as claimant before courts is, however, strongly influenced and weakened by the doctrine of "maintaining impairment of a right", which the Czech administrative courts mostly insist on (see above part 2.2). This general approach to the lawsuits of the NGOs influences also their ability to gain injunctive relief. It leads to the conclusion that an **NGO can never meet the conditions of suspensive effect, if they are interpreted in the standard way**. If NGOs do not have any (substantive) rights, there is also no possibility of harming them.

69. This approach was disputed by the SAC in cases related to the **review of the EIA statements** (see next part). SAC expressed the opinion that on the base of Art. 9 par 4 of the Aarhus Convention, the courts shall grant injunctive relieves, if the members of public concerned ask for them in their lawsuit concerning environmental protection, so that it cannot happen that by the time of the hearing, the project in question is already realized.

70. This interpretation could overturn previous opinion that NGOs literally cannot meet the criteria for obtaining injunctive relieves. However, the practice of administrative courts reflected this opinion of SAC only in a very restrictive way. The suspensive effect was granted to some lawsuits against building permits and logging permits. But in many more

[17] As a precedent case, decision of the District court in Plzeň dated 5 November 2004, ref. no. 57 Ca 14/2004 is quoted (it was published in the collection of administrative court decisions issued by the SAC under no. 455/2004).

cases, **the requests for suspensive effect keep to be refused**. The courts now do not say that NGOs can never meet the conditions, but interpret them in a way that to acknowledge the suspensive effect, NGO would have to prove really strong and serious threat of damage of the environment. At the same, namely concerning highways, they mostly tend to say there is a public interest in continuing with the building.

Case examples 3: courts refusing the NGOs requests for injunctive relief

In decision concerning a lawsuit against a building permit for a D8 highway (through "České středohoří" protected area), the court refused an NGO request for injunctive relief arguing that granting the injunctive relief would in practice mean stopping of the construction works, which would cause "*delays in the timetable of the highway constructions*", extra costs with "*serious impacts on public budgets*" and would influence the protection of life and health of the inhabitants of the affected municipalities. Therefore, the court concluded, the injunctive relief would be in conflict with the public interest.[18]

In decision related to another part of the same highway, the court refused an NGO request for injunctive relief again. It stated, with reference to the SAC case law, that in general, it is possible that an NGO could meet the legislative limits for granting an injunctive relief. However, with regard to the specific case, the court found out that the NGO did not prove that the decision could cause an "irreparable harm", as it argued by conflicts of the highway construction (as a whole) with the protected area, while the decision in question only permitted one section of the highway. According to the court, the plaintiff would have to bring evidence why this particular section would damage the nature in a considerable way. At the same time, however, when the assessing the condition of prevailing public interest, the court referred to the interest on building of the highway as a whole. [19] It seems that according to the court, the fact that the investor used a "salami slicing" method for obtaining the permits for the highway, caused that it became literally impossible for an NGO to meet the requirements for the injunctive relief.

It should be added that according to the constant case law, it is not possible for the applicant who asked for issuing injunctive relief to appeal against the decision of the court rejecting this request.

71. Finally, it must be mentioned that the last amendment of the EIA Act, which established specific provision for standing of the NGOs participating in the EIA procedure (Art 23 par 10 of the 100/2001 Coll. EIA Act - see above part 2.2) includes a sentence, according to which the lawsuit based on this provision cannot have suspensive effect (it was added to the Act in the course of negotiating the draft in the Parliament). It is uncertain if courts will apply this provision also in cases where the standing of the NGOs will not be based on this new provision of the EIA Act. It would be incorrect in our opinion, but it can happen that (some of) the administrative courts will apply this provision generally towards the lawsuits of NGOs in environmental matters.

[18] Decision of the City court of Prague dated 3 July 2007, ref. no. 6 Ca 7/2008.
[19] Decision of the City court of Prague dated 27 October 2009, ref. no. 10 Ca 302/2009-45.

72. **The communicant therefore concludes that the Czech Republic is not in compliance with the requirements of Art. 9 par 4 of the Convention on effective remedies and accessibility of injunctive relief.** Despite some progressive court decisions, the relevant legislation is too restrictive and constitute effective obstacles with that regard.

4.2 EIA screening decisions and "final opinions" are excluded from the possibility of direct court review

73. As described above (see part 1.2), EIA is a separate procedure ended by non-binding "statement", which represent an obligatory basis for further decision-making (permits) in the Czech legal system.

74. **The EIA statement is in no doubt an "act" in the sense of Art. 9 par 2 of the Aarhus Convention**. Administrative courts have, however, dismissed all lawsuits filed against the EIA statements so far (by affected individuals as well as by the NGOs), with justification that a non-binding act cannot be subject to judicial review as it cannot infringe anyone's subjective rights.

75. According to the SAC, the requirements of the Aarhus Convention (and analogically, of Art. 10a of the EIA Directive) are not infringed, as the legality of the EIA statements shall be subject to judicial review together with consequent development consents (permits). According to the SAC, neither the Convention nor the EIA directive require "direct" (separate) review of EIA statements. The SAC explicitly stated that "*Art. 9 of the Aarhus Convention shall not be interpreted in a way that it requires separate review of any decision, act or omission in the scope of permitting the activities subject to Article 6 in a separate review procedure*" and that "*it is sufficient if such acts are subject to the review procedure at the stage when they can infringe the subjective rights of the affected persons*".[20]

76. With that respect, the SAC also referred to the provision of Art. 10a of the EIA directive according to which "*Member States shall determine at what stage the decisions, acts or omissions may be challenged"*. The SAC used this provision also as justification for not addressing the European Court of Justice with a request for a preliminary ruling, if the "EIA statement" should be subject to "independent" judicial review according to Article 10a of EIA Directive. The SAC concluded that the interpretation of the EU law is completely clear and self-evident (*acte clair*). The communicant considers this as breaching of Art. 234 (currently Art. 263) of the Treaty on European Union.

77. According to the communicant, this approach is not in compliance with the requirements of **adequate, effective and timely remedies** according to Article 9 par 4 of the Aarhus Convention. The EIA statement shall be according to the case law of the SAC subject to judicial review, but only after the subsequent decision – mostly the land use permit – is issued. This can in practice happen years after the EIA procedure is finished.[21] The court

[20] Quoted according to the SAC decision dated 29 August 2007, ref. no. 1 As 13/2006-63. Similar opinion was expressed by the SAC in the decisions dated 14 June 2006, ref. no.2 As 59/2005-136, dated 14 June 2007, ref. no.1 As 39/2006-55, dated 26 June 2007, ref. no.4 As 70/2006-72, dated 28 June 2007, ref. no.5 As 53/2006-46, or dated 22 February 2008, ref. no.6 As 52/2006-155.

[21] For example, in the R52 Brno-Mikulov (Vienna) highway case, the EIA opinion was issued on 13 May 2003

procedure as such can last for several more years. Issuing of the injunctive relief is not granted and in practice it is unlikely (see previous section 4.1). Review of the outcomes of the EIA procedure is therefore not possible in reasonable time and therefore inefficient.

78. Moreover, as described in part 2.1, the scope of subjects having standing to sue the development consent (land use permit) is restricted with respect to the definition of "public concerned". The impossibility of direct judicial review of the EIA statement can therefore be interpreted also as a non compliance with Art. 9 par 2 of the Aarhus Convention.

79. What was described above with regard to the "EIA statements" fully applies also for the "screening decisions" in cases concerning the projects where according to Art. 4 par. 2 of the EIA directive and subsequently according to the Czech EIA Act it is up to the competent authority do decide if the EIA will take place or not ("Annex II projects"). The decision not to carry out the EIA procedure shall be deemed as falling into the scope of Art. 9 par 2 of the Aarhus Convention, with regard to paragraph 20 of Annex I of this Convention and also concerning the fact that it deals with correct application of the requirements of EU law (the EIA directive) to assess whether an activity shall be subject to EIA.[22]

80. The Czech courts, including the SAC, have however refused a direct review of the EIA screening procedures with the same arguments they applied on the "EIA statements". Also the screening decisions shall be, according to the SAC, subject to judicial review only together with the subsequent development consents (permits) for the respective activities (investments).[23]

81. The communicant is convinced that in case of the screening decisions, it is even more evident that they should be considered as acts (decisions) directly influencing the rights of the affected persons and should be therefore subject to direct judicial review. The approach of the Czech courts is blocking the possibility of the public concern to object the fact that EIA was not carried out in a reasonable time.

82. **The communciant therefore claims the Czech Republic is not in compliance with Art. 9 par 4 of the Convention also with respect to the review of the "EIA statements" and the screening decisions.** This situation can be seen, in some cases, also as further non-compliance also with Art. 9 par 2 of the Convention.

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and there is still no land use permit in this case.

[22] In this respect, the communicant reminds that the Compliance committee clarified in a number of cases (e.g. Denmark - ECE/MP.PP/2008/5/Add.4), that the EU law has to be interpreted as a part of national law of the Parties to the Aarhus Convention.

[23] The SAC has expressed this opinion e.g. in the decisions dated 22 February 2008, ref. no.6 As 52/2006-155 and dated 5 September 200á, ref. no.2 As 68/2007-50.

IV. Nature of alleged non-compliance

This communication relates to general failures of the Czech Republic to implement, or to implement correctly, the provisions of Article 6 paragraphs 3 and 8 and Article 9 paragraphs 2, 3 and 4 of the Convention.

V. Provisions of the Convention relevant for the communication

Article 9 par 2, Article 9 par 3, Article 9 par 4
Article 6 par 3, Article 6 par 8
Article 3 par 1

VI. Use of domestic remedies or other international procedures

This communication refers to general failures concerning correct implementation of the above listed provisions of the Convention. The problems mentioned in the communication were repeatedly mentioned by NGOs (including the communicant), on various occasions (i.a., in the NGO alternative implementation reports before Meetings of Parties of the Aarhus Convention). [24]

The communication contains examples and references to various cases. In all of these cases, domestic procedures (namely lawsuits to courts and cassation complaints to the SAC, where available) have been invoked. In many of them, the aspect of non-compliance of the Czech Republic with the requirements of the Aarhus Convention which are subject of this communication was expressly addressed. Other cases are pending.

As mentioned in parts 2.1. and 2.2 of section IV. of this communication, an infringement procedure against Czech Republic has been started by European Commission for insufficient transposition of some provisions of art. 10a of the EIA directive (pending ECJ case C-378/09). The reasons of this infringement procedure, according to the information available to the communicant, are similar to some aspects of non-compliance of the Czech Republic with the Convention, namely with respect to Art. 9 par 2.

VII. Confidentiality

The communicant does not ask for any information contained in this communication to be kept confidential.

VIII. Supporting documentation (copies, not originals)

This communication contains various references to legislation, decisions and other documents. Some reference can be downloaded by weblinks provided in the communication. The communicant kindly asks the Compliance Committee to indicate what supporting material would be crucial for the case and should be provided by the communicant.

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[24] See e.g. an English summary of 2008 NGO report at http://www.ucastverejnosti.cz/dokumenty/aarhuska-umluva-2008-aj-sestava-1.pdf

IX. Summary

Implementation of the Aarhus Convention (Art. 9) in the Czech Republic can be generally evaluated as rather inconsistent and not fully in compliance with the Conventions requirements.

On one hand, it is relatively easy for the members of the public concerned, namely environmental NGOs to participate in the environmental decision making procedures (also beyond the scope of Art. 6 of the Convention). Consequently, they also have access to the judicial review of the decisions according to Art. 9 par 2 and to some extent also Art. 9 par 3..

On the other hand there are lot of gaps and shortcomings concerning both the relevant legislation and practice of the authorities and namely the courts.

From the legislative point of view, the most problematic is the fact that there is no or limited right for members of the public to participate in some of the environmental procedures and subsequently to ask for the court review of their outcomes. This concerns the individuals beyond the property owners (neighbours) in the land use permitting and building procedures (see part IV.2.1.) and with respect to adoption land use plans (see part IV.3.2; here there is also no possibility of the NGos to access of the NGOs to the court review procedures). All members of the public concerned, including the NGOs are excluded from the in some specialized procedures (e.g. issuing the noise exceptions or procedures according to the Nuclear Act - see part IV.3.1). **These legislative gaps represent, according to the communicant, non-compliance of the Czech Republic with both Art. 9 par 2 of the Aarhus Convention** (with respect to the activities listed in Annex I) **and Art. 9 par 3** (in other cases).

A particular problem represents lack of access to justice against administrative omissions in cases when the authorities fail to start a procedure *ex officio*, despite they are legally obliged to do so. In such cases, no member of the public concerned has access to the review procedure at court (see part IV.2.3). **This is, according to the communicant, another non-compliance of the Czech Republic with both Art. 9 par 2 of and the Art. 9 par 3 of the Aarhus Convention.**

The interpretation of the Aarhus Convention provided by the Czech courts is not too comprehensive and consistent. There are some decisions in which the courts (namely the SAC) used the Convention for supporting the progressive interpretation (concerning e.g. terms for the injunctive relief if an NGO asks for it in environmental cases).

However, the **prevailing impairment of rights doctrine in many cases prevents the courts to fully implement the requirements of the Convention**. This relates namely to the problem of "scope of permissible arguments" of the NGOs lawsuits. **NGOs are forced to concentrate on infringements of their procedural rights by the courts approach according to which they are not entitled to ask for review of the substantive legality of environmental decisions** (see part IV.2.2)**. In cases related to the decisions subject to Art. 6 of the Convention, this should be seen as a clear non-compliance with the requirements of Art. 9 par 2.** The communicant is convinced that is approach is also not compatible with Art. 9 par 3 in other environmental cases.

The legislative conditions and praxis of the Czech courts concerning issuing the preliminary measures (injunctive relieves) on the request of the members of public concerned, in combination with the average length of the court procedures is, despite of some progressive decisions of the SAC, in general too restrictive (see part IV.4.1). It often results in the situation that permitted activity is finalized before the court decision about the permit. **There is also no direct access to judicial review of the EIA final statements and screening decisions**, what is caused by the legislative status of these acts in the Czech system (they do not have form of binding decisions - see part IV.1.2) but also by the court interpretation (see part IV.4.2). **All these aspects represent, according to the communicant, a non-compliance of the Czech Republic with the requirements of effective and timely remedies according to Art. 9 par 4 of the Convention**.

To conclude it can be said that **the Czech Republic is not in compliance with a number of specific aspects (requirements) of Article 9 paragraphs 2, 3 and 4, as well as Article 6 paragraphs 3 and 8 of the Aarhus Convention**. **Neither Art. 3 paragraph 1 is therefore fully implemented**, as the implementation of the access to justice provisions of the Convention is not sufficiently clear, transparent and consistent.

X. Signature

Brno 14 June 2010

Pavel Černý
on behalf of Ekologický právní servis