Findings and recommendations with regard to communication ACCC/C/2010/50 concerning compliance by the Czech Republic

Adopted by the Compliance Committee on 29 June 2012[1]

I. Introduction

1. On 14 June 2009, the Czech organization Environmental Law Service ("Ekologický právní servis") (hereinafter, "the communicant"), submitted a communication to the Compliance Committee alleging a failure by the Czech Republic to comply with its obligations under article 3, paragraph 1, article 6, paragraphs 3 and 8, and article 9, paragraphs 2, 3 and 4, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter "the Aarhus Convention" or "the Convention").

2. The communication alleges that the law and practice of the Party concerned provides for a restrictive definition of who may be parties in environmental decision-making due to the so called "impairment of rights doctrine", thus restricting standing for individuals in a number of cases, relating, among others, to land use and building permits. The communication further alleges that the Party concerned provides limited rights to non-governmental organizations (NGOs) to challenge the substantive and procedural legality of environmental permits falling under article 6 of the Convention; and that the Party concerned does not provide for review procedures with respect to administrative omissions regarding activities subject to article 6. For these reasons, the communication alleges that the Party concerned fails to comply with article 9, paragraph 2, of the Convention, especially with respect to the review of issues under article 6, paragraphs 3 and 8. The communicant also alleges that, in light of the above, article 2, paragraph 5 is not properly transposed into Czech legislation.

3. The communication further alleges that because a considerable part of the members of the public, including NGOs, have no access to court procedures for the review of acts and omissions relating to the environment, including those relating to land use plans, the Party concerned fails to comply with article 9, paragraph 3, of the Convention. It also alleges that because courts may order injunctive relief only in very few cases, remedies are ineffective in environmental matters and that the Party concerned thus fails to comply with article 9, paragraph 4, of the Convention. Finally, the communication alleges that the Party concerned in general fails to provide for a sufficiently clear, transparent and consistent framework on access to justice, as required by article 3, paragraph 1, of the Convention.

4. At its twenty-ninth meeting (21-24 September 2010), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 14 October

[1] This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes which are not part of the editorial process and aim at correcting errors in the argumentation, but have no impact on the findings and conclusions) may take place.

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2011. On the same date, a number of questions were sent to the communicant soliciting clarification and additional information on a number of issues in the communication.

6. At its thirty-first meeting (22-25 February 2011), the Committee agreed to discuss the content of the communication at its thirty-second meeting (11-14 April 2011).

7. The Party concerned responded to the allegations of the communication on 14 March 2011.

8. The Committee discussed the communication at its thirty-second meeting, with the participation of representatives of the communicant and the Party concerned. At the start of the discussions, the Committee informed the parties that at the upcoming fourth session of the Meeting of the Parties the composition of the Committee would be altered. As a consequence, there was a high probability that consideration of the communication would not be concluded by the Committee in its current composition, but would continue after the fourth session with three of the Committee members replaced. At the same meeting, the Committee confirmed the admissibility of the communication.

9. The communicant provided a written version of its oral statement on 21 April 2011. The Party concerned submitted additional information to the Committee on 31 May 2011; and the communicant on 1 June 2011. By letter of 7 June 2011, the communicant reacted to the submissions of the Party concerned dated 31 May 2011.

10. The Committee prepared draft findings at its thirty-sixth meeting (27-30 March 2012) completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 4 May 2012. Both were invited to provide comments by 1 June 2012.

11. The communicant and the Party concerned provided comments on 30 May and 22 June 2012, respectively.

12. At its thirty-seventh meeting (26-29 June 2012), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the Committee's thirty-ninth meeting (11-14 December 2012). It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[2]

A. Legal framework

The Czech Constitution and the Convention

13. According to the Czech Constitution (art. 10), international agreements that have been approved by the Parliament and that are binding for the Czech Republic constitute a part of the legal order and in case of conflict with a national law, the international agreement will apply. However, the Czech courts have held that the provisions of the Aarhus Convention cannot be directly applicable, as they are not "sufficiently specific" or

[2] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

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"self-executing", that the citizens cannot derive their rights directly from the Convention and that therefore there is a need for national implementing legislation.[3]

Generally on standing in administrative law

14. Under Czech law, standing criteria in civil and administrative procedural law are based on the so-called "infringement of rights doctrine". According to this doctrine, parties to a procedure should be able to prove that they have experienced a violation of their rights due to a situation subject to that procedure.

15. Under the Code of Administrative Justice (law no. 150/2002 Coll., hereafter CAdminJ) section 65, the following persons have standing to initiate a review procedure of acts of administrative authorities: (a) persons whose rights or obligations were "created, changed, nullified or bindingly determined" by the act; and (b) other parties to administrative proceedings who assert that their rights have been infringed in these proceedings, which could lead to illegality of the final act (translation provided by the communicant).

16. Such a right exists when a person has already participated in an administrative procedure (other than an EIA procedure, as to which see para. 26 below). Specifically, the Code of Administrative Procedure (law no. 500/2004 Coll, hereafter CAdminP) section 27, states that standing is granted to: (a) the person(s) who submitted the request/application for a permit (applicant/developer); (b) in procedures initiated *ex officio*, persons for whom a decision has established, changed or cancelled their rights or obligations; (c) other persons concerned "as far as their rights or obligations can be directly affected by the administrative decision"; and (d) persons who are determined as parties to a procedure, according to special laws.

17. In addition, CAdminJ section 101a-101d provides for a possibility to judicially review measures of a general nature, such as land use plans.

Review of administrative omissions

18. CAdminJ section 79 provides that "a person who has used to no effect all the remedies that the procedural regulation applicable to the proceedings before an administrative authority stipulates for his protection against inactivity of an administrative authority, may claim through an action that a court impose on the administrative authority the duty to render a decision in rem or issue a certificate." (translation by the Party concerned)

19. CAdminP section 80 (2) stipulates that "measures aimed against inactivity shall be taken by the superior administrative authority also in the event that the competent administrative authority fails to commence proceedings within the deadline of 30 days of the date when it learnt of facts substantiating the commencement of proceedings ex officio". (translation by the Party concerned)

Injunctive relief criteria

20. The CAdminJ provides for two types of injunctive relief: suspensory effect (CAdminJ section 73) and preliminary injunction (CAdminJ section 38).

[3] For example, decision of the Constitutional Court of 2 September 2010, no. I ÚS 2660/08; decision of the SAC of 27 March 2010, no. 2 As 12/2006-111; and decision of the SAC of 24 January 2007, no 3 Ao 2/2007-42.

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21. Suspensory effect means that the legal force and enforceability of the contested decision is suspended. An action against a contested act does not have suspensory effect unless otherwise provided by law, but the Court may suspend the act, at the request of the claimant, provided certain conditions are met.

22. A preliminary injunction is an order granted in response to a request by the applicant, lodged together with the action, for the court to impose on the parties the duty to perform something, to refrain from something or to tolerate something.

23. Suspensory effect means that the contested action is suspended entirely, while, in the case of a preliminary injunction, the court has greater flexibility. Namely, the contested action may be partially or entirely suspended and the court may also adopt a range of other measures to ensure that the requirements of the subsequent judgment can actually be implemented.

24. The relationship between suspensory effect and preliminary injunction is mutually exclusive: where suspensory effect can be granted to an action or where an action has suspensory effect on the basis of law, a preliminary injunction cannot apply.

EIA procedure and standing

25. The EIA procedure is regulated by the EIA Act. The procedure is a self-contained process that is completed with the "EIA findings", which are not binding, but constitute an opinion on the basis of which the next step in the decision-making for a development consent takes place. For projects subject to annex II of the EIA procedure under the law of the European Union,[4] the authorities examine whether an EIA procedure is necessary to be carried out ("screening") and issue a screening conclusion with the outcome of the examination.[5]

26. The EIA procedure is open to participation by the public. However, as it is considered to be a self-contained procedure, public participation opportunities may be limited to the EIA procedure only with no possibility for the public to participate in the other parts of the decision-making process.

27. An amendment to the EIA Act was passed in December 2009. The new section 23, paragraph 10, states that environmental NGOs which submit comments during the EIA procedure have the right to initiate a review procedure before the court against the development consent decision issued after the EIA procedure. A lawsuit based on this provision does not have suspensory effect, but a preliminary injunction may be sought under administrative procedural law (CAdminJ section 38).

Other environmental decision-making processes and standing

28. Depending on the project, a number of permits may be required for its approval. Apart from the carrying out of the EIA procedure which will serve as a basis for the issuing of the permit for the activity itself (a building permit in most cases), the developer may need to acquire separate permits according to the laws regulating building, nature protection, water protection, air quality, integrated pollution prevention and control, mining, public health protection and nuclear activities. Those laws may also regulate standing.

[4] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC)(OJ L 175, 5.7.1985, p. 40).

[5] The parties in their submissions refer to the "EIA findings" as EIA statements or final opinions and to the "screening conclusions" as EIA screening decisions.

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29. For example, the Health Protection Act (section 31 para. 1) provides for the issuance of a permit from the authorities for an operator, under certain conditions. With respect to standing, according to the Act (section 94, para. 2), "the only party to the administrative procedure according to section 31 paragraph 1 of the act shall be the applicant."

30. Similarly, the Nuclear Act ("Act on Peaceful Exploitation of Nuclear Energy") provides for the issuance of a number of decisions and on the subject of standing states that "the operator shall be the only party to the procedures according to this act" (section 14, para. 1, translation provided by the communicant).

B. Substantive issues

31. The substantive issues raised by the communicant relate to provisions of the Czech legislation in general and their interpretation by the courts.

Article 3, paragraph 1

32. The communicant alleges that the Party concerned in general fails to comply with article 3, paragraph 1, of the Convention, because neither the law implementing article 9, paragraphs 3 and 4, nor court practice, demonstrate a clear, transparent and consistent framework to implement the latter provisions.

Article 6, paragraphs 3 and 8

33. Projects within the scope of article 6 of the Convention often require a multi-layer permitting process, including an EIA procedure, a land use permit and a building permit. According to the communicant, the public has a wide opportunity to participate in the EIA procedure, but not in the later stages of the permitting process. The Building Act provides for a limited scope of public participation to "persons, whose property rights or some other rights in rem to neighbouring land or structures thereon are likely to be directly affected" only (translation provided by the parties). The communicant alleges that this means that some categories of the public concerned, such as tenants, are excluded from public participation in land use and building permitting processes. In support of its claim, the communicant submits that the Supreme Administrative Court (SAC) has ruled that the Building Code defines the parties to the building procedure and it explicitly excludes tenants of flats and non-residential premises.[6] In addition, the EIA procedure is seen as a self-contained procedure and not as part of the decision-making procedure leading to a land use or building permit. This means that members of the public who participate in the EIA procedure may not be able to participate in subsequent phases of the permitting process. Furthermore, the comments of the public during the EIA procedure are not necessarily taken into account in the subsequent phases of the process.

34. For these reasons, the communicant alleges that Czech legislation does not allow for effective public participation and that the comments of the public are not duly taken into account in the decision-making process, as required under article 6, paragraphs 3 and 8, of the Convention.

35. The Party concerned disagrees with the communicant's allegations. It submits that public participation opportunities are widely provided to members of the public at all stages of the EIA procedure. In addition, public participation opportunities are widely provided to individuals and environmental NGOs on the basis of the CAdminP, section 27 and the

[6] SAC decision of 2 March 2005, no. 2 As 1/2005-62 (translation of relevant excerpts provided by the communicant).

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special laws that grant NGOs the right to be a party to various decision-making procedures. The Building Act is one such special law. The Party concerned concedes that that Act defines as parties mainly persons whose property or in rem rights are likely to be directly affected, but submits that this law is currently being amended to include the possibility for members of the public in general to submit comments during the procedure. The Party concerned also clarifies that according to the jurisprudence of the Constitutional Court the "directly affected property/in rem rights" criterion is assessed by administrative authorities on the basis of the nature of the building structure, its impact on the environment and the given circumstances.[7] It submits that anyone may therefore have the status of a neighbour in proceedings - even the most distant neighbour, such as the owner of a very distant plot of land or structure.

Article 9, paragraph 2

36. The communicant alleges that the Party concerned fails to comply with article 9, paragraph 2, of the Convention, for the following reasons:

(a) Since the criteria in Czech law determining the parties to environmental decision-making procedures subject to article 6 of the Convention are restrictive, members of the public cannot access review procedures;

(b) NGOs have limited rights to seek review of the substantive legality of environmental permits;

(c) There is no possibility to seek judicial review of administrative omissions related to activities covered by annex I to the Convention.

(a) Criteria for locus standi

37. The communicant alleges that since some members of the public concerned (i.e. individuals who are affected or likely to be affected by, or have an interest in, the environmental decision-making, but do not have "a real right to this land or the structure"), do not have a right to participate in the decision-making process beyond the EIA procedure, they accordingly have no standing under Czech law to seek a review of the decision, and the Party concerned thus fails to comply with article 9, paragraph 2, of the Convention.

38. In support of its allegation, the communicant submits that the SAC has ruled that "the tenant of real property on the area regulated by the land use plan does not have standing to sue for abolishing of the respective land use plan or its part", because the rights of the tenants "are not related directly to the area (land) in question, but to the person (owner) who enabled them to use it on the base of contract".[8]

39. The Party concerned disagrees and maintains that Czech law is in compliance with the Convention. The Party concerned adds that, according to the explanatory memorandum of the CAdminJ and related case law,[9] section 65 of the CAdminJ (see para. 15 above) is to be applied in such a way that the rights of individuals to contest an administrative procedure are not conditional on previous participation and that an application for review of a decision may be brought by anyone who claims that his/her rights have been impaired by a decision of an administrative authority. The Party concerned cites jurisprudence that it alleges speaks for the ad hoc interpretation of the "directly affected rights" by the authorities and the rights of distant neighbours. In the case of NGOs, standing is granted to an organization that has

[7] Constitutional Court File No. Pl. ÚS 19/99 of 22 March 2000.

[8] SAC decision of July 2009, no. 1 Ao 1/2009-120 (translation of relevant excerpts provided by the communicant).

[9] SAC decision of 23 March 2005, no. 6 A 25/2002-42).

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submitted written comments on the EIA documentation or expert report within the deadlines prescribed by law (EIA Act, section 23(10)), or if it was a party to a previous authorization procedure.

(b) NGOs and right to review substantive legality

40. According to the communicant, the impairment of rights doctrine substantially limits the position of NGOs before the courts. NGOs may seek court protection only with regard to their procedural rights in the decision-making procedure, because procedural rights are the only "subjective rights" that NGOs are granted. Such procedural rights arise, if for instance, NGOs participate in a hearing. However, NGOs cannot, for example, argue that a project not subject to EIA procedure should have been so. The communication claims that the amendment of the EIA Act (see para. 27 above) does not greatly improve the situation.

41. The communicant provides a list of decisions of the SAC to support its submission that NGOs promoting environmental protection can only seek review with respect to their procedural rights.[10] It submits that this is because NGOs are not holders of substantive rights which could be affected by the authority's decision-making, and moreover cannot claim that their right to a favourable environment (either their own or that of their members) has been infringed. No jurisprudence issued after 2009 has been provided.

42. The Party concerned contends that under Czech law, when locus standi is established, the review of the contested administrative decision concerns both the procedural and substantive legality of the act. However, while noting that the law does not make an explicit distinction in this regard, the Party concerned concedes that in practice jurisprudence may limit the scope of review of NGO claims to those claims relating to their procedural rights, and also the scope of review of the individuals' claims to those claims relating to their affected rights.

(c) Judicial review of administrative omissions

43. The communicant alleges that the courts interpret section 79 of the CAdminJ) in such a way that in effect no person can initiate a review procedure in situations where an administrative authority fails to start a procedure ex officio where the law requires it to do so. This situation, according to the communicant, is not in compliance with article 9, paragraph 2.

44. In support of its allegation, the communicant cites two decisions of the SAC,[11] in which the Court ruled that the Court cannot order an administrative authority to start administrative proceedings when there is a suggestion that such proceedings should start; but can only order the authority to issue a decision in the context of administrative proceedings that have already started.

45. The Party concerned disagrees with the communicant's allegations and refers to CAdminP, section 80(2) and CAdminJ, section 79 (see paras. 18 and 19 above).

Article 9, paragraph 3

46. The communicant alleges that since there has been no direct transposition of article 9, paragraph 3, into Czech law, the situations of non-compliance with article 9, paragraph 2,

[10] SAC decisions of 29 July 2004 no. 7 A 139/2001-67; of 30 January 2008, no. 8 As 31/2006-78; of 16 July 2008, no. 8 As 35/2007-92; of 11 December 2008, no. 8 As 31/2008-72; of 11 December 2008, no. 6 As 18/2008-107; of 31 March 2009, no. 8 As 10/2009-58; of 22 July 2009, no. 5 As 5As 53/2008-243(translation of relevant excerpts provided by the communicant).

[11] SAC decisions of 26 June 2007, no. 4 Ans 10/2006-59; and of 29 May 2008, no. 2 Ans 2/2008-57 (translation of relevant excerpts provided by the communicant).

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may also be considered under article 9, paragraph 3. The communicant brings the following issues in particular to the attention of the Committee:

(a) Czech legislation does not allow members of the public to participate in certain permitting procedures and excludes them from review procedures; and

(b) Affected persons have limited rights to ask for review of land use plans (including no access to the courts).

(a) Exclusion of any possibility for court review in permitting procedures

47. The communicant alleges that members of the public, including individuals and NGOs, have no right to seek the review of permitting procedures under certain laws, such as the Public Health Protection Act (with respect to noise exceptions), the Nuclear Act and the Mining Act. Under these laws only the applicants for a permit may be parties to administrative procedures and have the right to seek review. The communicant submits this is not in compliance with article 9, paragraph 3, of the Convention.

48. With respect to noise and the Public Health Protection Act, the communicant cites a decision by the City Court of Prague which denied standing to a member of the public who asked the court to review a noise exception decision. The Court refused standing on the ground that she was not a party to the administrative procedure (she had asked to be but was refused). The SAC subsequently annulled this decision, but for formal reasons and without commenting on the ruling of the City Court.[12]

49. With respect to the Nuclear Act, the communicant submits that the SAC has ruled that "the procedures according to the Nuclear Act are concentrated to ensure safety of using the nuclear energy […] Therefore, it is not necessary neither taking in mind the requirements of the Aarhus Convention, that the public concerned should necessarily have right to participate in all such procedures".[13] The SAC has also ruled that "Judicial review of the decisions issued according to Section 14 of the Nuclear Act is possible, but the only possible plaintiff is the only party to the administrative procedure, i.e. the applicant. The plaintiff (an NGO) does not have standing to sue such decision."[14] The Constitutional Court has ruled that "NGOs cannot claim a right for a favourable environment, as it can self-evidently belong only to natural, not legal persons. […] In the administrative procedure concerning permission for starting the operations in the nuclear power plant, rights of an environmental NGO for protection of life, privacy or favourable environment could not be affected, because these rights cannot belong to legal persons. Therefore, they also cannot claim violation of the right for access to court (due process of law) with that respect."[15]

50. The Party concerned for the most part disagrees with the communicant. It contends that the authorization of a project under Czech law requires a series of administrative procedures and the most important of these (such as those under the Building or EIA Acts) are fully open to the public concerned, including tenants. It submits that this approach is in accordance with the Convention.

[12] City Court of Prague decision of 26 September 2007, no. 12 Ca 47/2006 and SAC decision of 29 April 2009, no. 4 Ads 79/2008-61.

[13] SAC decision of 9 October 2007, no. 2 As 13/2006-110 (translation of relevant excerpts provided by the communicant).

[14] SAC decision of 19 May 2010, no. 2 As 9/2011-154 (translation of relevant excerpts provided by the communicant).

[15] Decision of the Constitutional Court of 2 September 2010, no. I ÚS 2660/08 (translation of relevant excerpts provided by the communicant).

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51. With respect to noise and nuclear matters, the Party concerned agrees with the communicant's account of the parties to those procedures. However, it notes that in the case of an application under the integrated pollution prevention and control procedure, "party" is defined more broadly to include the municipality in whose territory the facility is to be located, the regional authority, NGOs, public service companies, confederation employers and business chambers that aim to promote and protect professional or public interests.

(b) Limited access of affected persons to review procedures for land use plans

52. The communicant alleges that while Czech law provides for the possibility of judicial review of measures of general nature (CAdminJ sections 101a-101d, the courts have interpreted the law in a way that prevents members of the public, including NGOs, from seeking review of land use plans.). In this regard, communicant refers to the decision by the SAC that "the tenant of real property of the area regulated by the land use plan does not have standing to sue for abolishing the respective land use plan or its part."[16] The communicant alleges that the courts use the Building Act to interpret this provision of the CAdminJ. As noted previously, the Building Act specifically limits parties to the procedure to the applicant and the "neighbours" (those who have in rem rights)). According to the communicant, this constitutes non-compliance with article 9, paragraph 3, of the Convention and has particular relevance for plans and programmes under article 7 of the Convention.

53. The Party concerned refutes the communicant's allegation. It submits that a land use plan is not a regulation or a decision, but an administrative act that is issued after a long and complicated process. In granting locus standi, the courts apply the impairment of rights doctrine, as set out in CAdminJ section. 101a (1), which is appropriate as an application to cancel a land use plan should not be made by just anyone, but rather only those who claim that their rights have been impaired by the plan. In this regard the Party concerned considers quite appropriate the obiter dictum by the SAC which can be seen as a guideline for the courts' future decision-making: "in view of the obligations following for the Czech Republic from international law and European Community law, it cannot be *a priori* ruled out that *locus standi* to lodge an application…could also be afforded to members of the 'public concerned' within the meaning of art. 9 (2) and (3) of the Aarhus Convention."[17] The Party concerned also submits that this supports its submission that the Czech courts tends to construe locus standi extensively, including potential direct application of the EU acquis. It cites a subsequent decision by the SAC granting locus standi to an NGO to review the merits of a decision concerning visitor rules of the Sumava National Park in which the Court derived standing for the NGO directly from the Aarhus Convention provisions.[18] Moreover, the Party concerned states that, while that case concerned a general measure and not a land use plan, the SAC decision concerning the Sumava National Park can be viewed as a pioneering decision. It is not aware of any other cases that follow up or extend that decision.

54. The communicant, in response to the references made by the Party concerned to jurisprudence, contends that the SAC repeatedly dismissed lawsuits lodged by environmental NGOs concerning land use plans and mentions a 2011 decision in which the SAC ruled that "it is necessary to insist on the requirement of infringement of right by the act of general measure which is subject to review. […] Only a person who has direct

[16] SAC decision of 21 July 2009, Ref. No. 1 Ao 1/2009 – 120 (translation of relevant excerpts provided by the communicant and the Party concerned).

[17] Ibid.

[18] SAC decision of 13 October 2010, Ref. No. 6 Ao 5/2010 – 43 (translation of relevant excerpts provided by the communicant and the Party concerned).

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relation to the area, regulated by the land use plan, can be infringement on his rights by adoption of the plan. Therefore, an environmental NGO is not entitled to file a lawsuit against the land use plan."[19]

Article 9, paragraph 4

55. The communicant focuses its allegations on injunctive relief measures, as follows:

(a) The criteria for injunctive relief are too restrictive; and

(b) EIA screening conclusions and EIA findings are excluded from the possibility of direct court review.

(a) Criteria for injunctive relief

56. According to the communicant, the time to process a case before the courts is very lengthy, while the criteria for injunctive relief are interpreted and implemented in a very restrictive manner. It alleges that this constitutes non-compliance with article 9, paragraph 4, of the Convention, which requires effective remedies and access to injunctive relief.

57. The communicant alleges that, in particular, the condition that the requester has to prove "irreparable damage", is very difficult to fulfil and in practice is never met. The communicant also maintains that while the criteria for a preliminary injunction are less strict than for suspensory effect ("serious" instead of "irreparable" harm), the likelihood that either is actually granted is very rare. For NGOs, it is very difficult to prove harm that "irreparable" or "serious", because this is usually interpreted to require harm to subjective rights and not of public interest rights.

58. The communicant cites a 2004 decision of the District Court of Plzen, according to which "the nature of the land use permit excludes, on the general level, to cause the 'irreparable harm' as supposed by Section 73 (2) of C AdminJ, because such decision does not constitute the right of the investor to start with building of the project".[20] The communicant claims that this decision has been quoted in many other decisions of regional courts. Though some courts have opted for a more liberal interpretation, the communicant alleges that the typical line of argumentation is that "granting injunctive relief would in practice mean stopping the construction of works, which would cause 'delays in the timetable of constructions', extract costs with serious impacts on public budgets and would influence the protection of life and health of the inhabitants of the affected municipalities".[21]

59. The communicant concedes that, with respect to the review of EIA findings, the SAC has ruled that the courts shall grant injunctive relief on the basis of article 9, paragraph 4 of the Convention, if the members of the public concerned ask for it 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. In the view of the communicant, the SAC's ruling is positive, but the practice of administrative courts is to interpret the SAC's ruling in a very restrictive way. While requests for suspensory effect have been granted in some cases, in many others it has been refused. In particular, the construction of highways is seen as a project of general public interest and injunctions are not granted.

[19] SAC decision of 27 January 2011, no. 7 Ao 7/2010 – 133 (translation of relevant excerpts provided by the communicant).

[20] District Court of Plzen of 5 November 2004, no. 57 Ca 14/2004 (translation of relevant excerpts provided by the communicant).

[21] Decision of the City court of Prague of 2 July 2007, ref. no. 6 Ca 7/2008 (translation of relevant excerpts provided by the communicant).

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60. The Party concerned contends that the Convention leaves it to Parties' discretion to decide the form and conditions of injunctive relief. The form of injunctive relief and its conditions must be such that the measure prevents irreversible damage to the environment. Hence, the Convention (and EU Directives 85/337/EEC and 96/61/EC), does not require that injunctive relief be granted automatically in the case of any action lodged by the public concerned; rather the courts have to examine whether the project for which the permits have been issued will have an irreversible impact on the environment. The courts evaluate whether an activity causes a particular risk to the environment and whether it is necessary to issue injunctive relief. The Party concerned maintains that the requirements of article 9, paragraph 4, of the Convention are adequately reflected in Czech legislation and this is further supported by the case-law of the administrative courts.[22]

(b) No court review for EIA screening conclusions and EIA findings

61. The communicant alleges that since the EIA findings are not seen as "binding" under Czech law and thus are not considered to infringe the subjective rights of the members of the public, judicial review is not possible. The communicant notes that the SAC has ruled that "article 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."[23] In addition, the SAC has stated that in general there is no need for the screening conclusion to be examined separately from the subsequent permits and that EU law leaves it to the discretion of its Member States to decide at what stage the decisions, acts or omissions can be challenged.[24] The communicant alleges that the above has been the standard line of interpretation by the Ministry of Environment and the courts,[25] and that this constitutes non-compliance with the requirement in article 9, paragraph 4, for adequate, timely and effective remedies.

62. The Party concerned maintains that, in relation to the review of EIA findings and screening conclusions, Czech law fulfils the requirements of article 9, paragraph 4, of the Convention to a satisfactory level. Under Czech law, the EIA procedure is not integrated in the decision-making process, but is a separate process that serves as an expert basis for the final authorization of the activity. The review of acts of administrative authorities is allowed only at a stage when such acts may interfere with the legal sphere of natural and legal persons, and the EIA findings are not such an act. The Party concerned contends that this approach is in compliance with the Convention.

III. Consideration and evaluation by the Committee

63. The Czech Republic deposited its instrument of accession on 6 July 2004. The Convention entered into force for the Czech Republic on 4 October 2004.

64. The Committee decides not to deal with the allegations of non-compliance with article 3, paragraph 1, of the Convention, because there was a clear understanding by the parties and the Committee of the applicable law and thus the allegations of the communicant in this respect have not been substantiated.

[22] In particular, SAC decision of 29 August 2007, Ref. No. 1 As 13/2007-63.

[23] SAC decision dated 29 August 2007, ref. no. 1 As 13/2006-63 (translation of relevant excerpts provided by the communicant).

[24] SAC decision of 29 August 2007, ref. no. 1 As 13/2007-63 and SAC decision of 5 September 2009, ref. no. 2 As 68/2007-50 (translation of relevant excerpts provided by the communicant).

[25] SAC decision of 29 August 2007 no.1 As 13/2007-63.

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The definition of "the public concerned" and tenants (art. 2, para. 5)

65. The public participation provisions in article 6 of the Convention mostly refer to the "public concerned", i.e. a subset of the public at large. The members of the public concerned are defined in article 2, para. 5 of the Convention on the basis of the criteria of "affected or likely to be affected by", or "having an interest in", the environmental decision-making. Hence, the definition of the Convention is partly based on the concept of "being affected" or "having an interest", concepts which are also found in the Czech legal system.

66. While narrower than the definition of "the public", the definition of "the public concerned" under the Convention is still very broad. Whether a member of the public is affected by a project depends on the nature and size of the activity. For instance, the construction and operation of a nuclear power plant may affect more people, within the country and in neighbouring countries, than the construction of, say, a plant for tanning or a slaughterhouse. Also, whether members of the public has an interest in the decision-making depends on whether their property and other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity. Importantly, this provision of the Convention does not require an environmental NGO as a member of the public to prove that it has a legal interest in order to be considered as a member of the public concerned. Rather, article 2, paragraph 5, deems NGOs promoting environmental protection and meeting any requirements under national law to have such an interest.

67. A tenant is a person who holds, or possesses for a time, land, a house/apartment/office or the like, from another person (usually the owner), usually for rent. An activity may affect the social or environmental rights of the tenants, especially if they have been or will be tenants for a long period of time. In that case, to a certain extent, the interests of the tenants would amount to the interests of the owners. Although the relationship of the tenant to the object is always intermediated, since tenants, even short-term tenants, may be affected by the proposed activity, they should generally be considered to be within the definition of the public concerned under article 2, paragraph 5, of the Convention and should therefore enjoy the same rights as other members of the public concerned.

Effective public participation at each stage (art. 6, para. 3)

68. During the discussion of the communication at the Committee's thirty-second meeting, the Party concerned explained that in the multi-layer decision-making process proscribed by Czech law, the building permit constitutes the final permit/decision in the context of article 6 of the Convention. The following elements were also clarified: that the EIA findings are not a decision in themselves, but a basis for the subsequent land use and building permitting processes; that the EIA procedure is an open participatory process, whereas participation in the decision-making for the subsequent phases is limited to those members of the public that are recognized by law as "parties" to the land use and building proceedings; that, consequently, members of the public concerned during the EIA procedure are not the same as the members of the public in the subsequent land use and building permitting procedures; that NGOs have limited rights to participate after the conclusion of the EIA procedure; and that tenants, while they may be able to participate in the EIA procedure, are not able to participate in the subsequent stages, because the law does not recognize them as "parties" to those procedures, but usually limits parties to natural persons whose in rem rights are affected or likely to be affected.

69. Article 6, paragraph 3, of the Convention relates to "reasonable time frames" for the different phases of the decision-making allowing sufficient time for the public to prepare and participate effectively during the environmental decision-making. By requiring "reasonable time frames" for effective public participation in the different phases of the

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decision-making, the Convention presupposes that in multi-phase environmental decision-making procedures, such as those provided for under Czech law, opportunities for the public to participate should be provided in each decision-making phase. With respect to tiered decision-making processes (whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage), the Committee has held that:

> "taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details related to specific environmental standards." (ACCC/C/2006/16 (Lithuania) ECE/MP.PP/2008/5/Add.6, para. 71).

70. While Czech law provides for wide public participation at the EIA stage, it limits opportunities for public participation after the conclusion of the EIA. The Committee stresses that environmental decision-making is not limited to the conduct of an EIA procedure, but extends to any subsequent phases of the decision-making, such as land use and building permitting procedures, as long as the planned activity has an impact on the environment. Czech law limits the rights of NGOs to participate after the EIA stage, and individuals may only participate if their property rights are directly affected. This means that individuals who do not have any property rights, but may be affected by the decision, are excluded. Although the Party concerned contends that the results of the EIA procedure are taken into account in the subsequent phases of the decision-making, members of the public must also be able to have insight and to comment on elements determining the final building decision throughout the land planning and building processes. Moreover, public participation under the Convention is not limited to the environmental aspects of a proposed activity subject to article 6, but rather extends to all aspects of those activities. In addition, even if, as the Party concerned contends, the scope of stakeholders with property rights is interpreted widely to include the most distant owners of land plots and other structures, individuals with other rights and interests are still excluded from the public participation process. Therefore, the Committee finds that through its restrictive interpretation of "the public concerned" in the phases of the decision-making to permit activities subject to article 6 that come after the EIA procedure, the Czech legal system fails to provide for effective public participation during the whole decision-making process. Thus the Party concerned is not in compliance with article 6, paragraph 3, of the Convention.

Authorities take due account of the outcome of public participation in the decision (art. 6, para. 8)

71. The communicant alleges that the comments provided by the public during the EIA procedure are not necessarily taken into account in the subsequent decision-making phases, because the EIA procedure does not constitute a binding decision-making act. The Party concerned disagrees that the comments are not taken into account. As set out in para. 70 above, the Committee finds that the Czech legal system fails to provide for effective public participation during all stages of the environmental decision-making process. Moreover, under article 6, paragraph 7 of the Convention, public participation must not be limited to the consideration of the environmental impact of a proposed activity, but entitles the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity, including its views on aspects of the activity's permissibility and its compliance with environmental law. According to Environmental Assessment Act (art. 10 s.

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1) the EIA opinion "is issued also based on the public comments". Furthermore, the same act (art. 10 s. 4) provides that "without the opinion it is not possible to issue a decision needed for carrying out a project". However, Czech law does not require that the authorities issuing the permitting decision fully uphold the content of the EIA opinion. While the EIA procedure provides for public participation, the Committee considers that the above legal framework does not ensure that in the permitting decision due account is taken of the outcome of public participation. In the light of the above, the Committee finds that the Party concerned fails to comply with the requirement in article 6, paragraph 8, of the Convention to ensure that due account is taken in the decision of the outcome of the public participation.

Standing of individuals and NGOs to access review procedures relating to public participation under article 6 (art. 9, para. 2)

72. The communicant alleges that since members of the public are not recognized as parties to an administrative (land use or building) permitting procedure, they cannot be granted locus standi to seek review of the procedure.

73. The communicant cited two decisions from the SAC to substantiate its allegations concerning the rights of individuals, in particular with respect to "tenants".[26] Czech legislation and practice determines standing rights for individuals after the conclusion of the EIA procedure on the basis of whether their property rights have been infringed or not. This means that tenants cannot seek the review of a final building permit on the basis of their right or interests relating to the environment or health or their interest in the activity and the impact that this may have in their lives.

74. The Party concerned submits that the CAdminJ permits an application for review of a decision to be brought by anyone who claims that his/her rights have been impaired by a decision of an administrative authority. The communicant argues that the SAC jurisprudence has been very restrictive in applying the "infringement of rights" theory and that in effect standing is only granted to individuals whose property rights have been impaired by an authority. The communicant also submits that it is not able to provide the Committee with court decisions in this regard, because in practice, it is very rare that subjects who are explicitly excluded from being participants to a specific administrative procedure would file a lawsuit against the final decision issued in that procedure.

75. The Committee recalls its earlier findings regarding the definition of standing under the Convention, where it held that, while Parties retain some discretion in defining the scope of the public entitled to standing, this determination must be consistent "with the objective of giving the public concerned wide access to justice within the scope of the Convention" (ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para. 33). Hence, in exercising their discretion, Parties, may not interpret these criteria in a way that significantly narrows down standing and runs counter to their general obligations under articles 1, 3 and 9 of the Convention.

76. However, in the absence of evidence of court jurisprudence to corroborate the communicant's submission, the Committee cannot conclude that the Party concerned fails to comply with the Convention with regard to standing of individuals under article 9, paragraph 2. The Committee notes that if Czech courts systematically interpret the provision of CAdminJ section 65 in such a way that the "rights" that have been "created, nullified or infringed" by the administrative procedure refer only to property rights and do not include any other possible rights or interests of the public relating to the environment (including

[26] SAC decision of 2 March 2005, no. 2 As 1/2005-62; SAC decision of July 2009, no. 1 Ao 1/2009-120 (translation of relevant excerpts provided by the communicant).

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those of tenants), this may hinder wide access to justice and run counter to the objectives of article 9, paragraph 2, of the Convention.

77. With respect to the rights of NGOs to seek review procedures, the communicant did not provide case law in support of its allegations. During the discussions, it was agreed by both parties that NGOs have some rights – although not as broad as during the EIA procedure – as parties to the procedures and may seek review. Specifically, NGOs that have already submitted written comments during the EIA procedure or that have been a party to a previous authorization procedure have standing in the subsequent procedures (see also para. 39 above). The Committee recalls that in defining standing under article 9, paragraph 2, the Convention provides guidance to the Parties on how to interpret the "sufficient interest" of NGOs. Hence, the interest of NGOs meeting the requirements of article 2, paragraph 5, of the Convention should be deemed sufficient and should be deemed to have rights capable of being impaired. Moreover, the rights of such NGOs under article 9, paragraph 2, of the Convention are not limited to the EIA procedure only, but apply to all stages of the decision-making to permit an activity subject to article 6.

78. While Czech law may not be fully clear and consistent in all respects as regards standing of NGOs, the Committee notes that NGOs are not able to participate during the entire decision-making procedure, since for NGOs, standing after the conclusion of the EIA stage is linked to the exercise of their rights during the EIA procedure or other procedures prior to the decision/authorization. The Committee finds that this feature of the Czech legislation limits the rights of NGOs to access review procedures regarding the final decisions permitting proposed activities, such as building permits. In this respect the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

Scope of review in procedures relating to public participation under article 6 (art. 9, para. 2)

79. There is a common understanding between the parties with respect to what can be reviewed by the courts of the Party concerned: in principle, any applicant has to prove that its rights have been affected. Individuals have procedural and substantive rights, the latter of which may encompass rights or interests relating to the environment, but NGOs have only procedural rights which may be violated. This practice is not based on legislation, but has been developed by jurisprudence.

80. In this regard, the Committee has held that "article 9, paragraph 2, of the Convention addresses both substantive and procedural legality. Hence, the Party concerned has to ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases" (ACCC/C/2008/33 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.3, para. 123).

81. The situation as described by the parties indicates that under Czech law individuals may seek review of the procedural and limited substantive legality of decisions under article 6; and that NGOs may seek the review only of the procedural legality of such decisions. In the light of NGOs' limited right of review, the Committee finds that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

82. With respect to the communicant's allegations that the Czech legal system fails to provide for judicial review of EIA screening conclusion, article 6, para. 1(b) of the Convention requires Parties to determine whether an activity which is outside the scope of annex I, and which may have a significant effect on the environment, should nevertheless be subject to the provisions of article 6. Therefore, when this is determined for each case individually, the competent authority is required to make a determination which will have the effect of either creating an obligation to carry out a public participation procedure in

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accordance with article 6 or exempting the activity in question from such an obligation. Under Czech law, that determination is in practice made through the EIA screening conclusions. As such, the Committee considers the outcome of the EIA screening process to be a determination under article 6, paragraph 1(b). Article 9, paragraph 2, of the Convention requires Parties to provide for access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of article 6. This necessarily also includes decisions and determinations subject to article 6, paragraph 1(b). The Committee thus finds that, to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1(b), members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process. Since this is not the case under Czech law, the Committee finds that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

Review procedures with respect to acts and omissions of public authorities and private persons (art. 9, para. 3)

83. With respect to the possibility for members of the public to access administrative or judicial review procedures to challenge acts and omissions by private persons or private authorities, the communicant put forward examples relating specifically to health issues, nuclear matters and land use plans.

84. Under article 9, paragraph 3, of the Convention, members of the public have the right to challenge violations of provisions of national law relating to the environment. It is sufficient that there is an allegation by a member of the public that there has been such violation. (ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4) Moreover, it is not necessary that the alleged violation concern environmental law in a narrow sense: an alleged violation of any legislation in some way relating to the environment, for example, legislation on noise or health, will suffice. With respect to noise exception permits, Czech law, as interpreted by Czech courts, stipulates that only the applicant for the permit or the operator may be a party to the permit procedure and, according to Czech jurisprudence, this also defines standing before the courts.

85. While article 9, paragraph 3, of the Convention accords greater flexibility to Parties in its implementation, compared to paragraphs 1 and 2 of that article, the Committee has previously held (Ibid and ACCC/C/2005/11 (Belgium) ECE/MP.PP/C.1/2006/4/Add.2) that the criteria for standing may not be so strict that they effectively bar all or almost all environmental organizations or members of the public from challenging acts of omissions under this paragraph. It is clear from the oral and written submissions of the parties, that if an operator exceeds some noise limits set by law, then no member of the public can be granted standing to challenge the act of the operator (private person) nor the omission of the authority to enforce the law. In addition, it is evident that in cases of land use planning, if an authority has issued a land use plan in contravention of urban and land planning standards or other environmental protection laws, a considerable part of members of the public, including NGOs, cannot challenge this act of the authority. The Committee finds that such a situation is not in compliance with article 9, paragraph 3, of the Convention.

86. The communicant also made allegations of non-compliance with article 9, paragraph 3, of the Convention with respect to nuclear matters. The communicant substantiated its allegations with excerpts from court jurisprudence. However, the Committee considers this jurisprudence as relating to standing to challenge operation permits under the Nuclear Act, and thus to be covered by article 9, paragraph 2, of the Convention issue. The Committee notes in particular the jurisprudence which excludes members of the public, including NGOs, from challenging operating permits on the ground that it is not mandatory for the public to participate in nuclear safety matters and the ruling which specifically excludes NGOs on the ground that they do not have rights to life, privacy or favourable environment

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which could be affected. If indeed standing to challenge nuclear operation permits is limited because public participation is limited, then there are serious concerns of non-compliance not only with article 9, paragraph 2, of the Convention, but also with article 6 of the Convention. However, as decision-making for the construction and operation of nuclear installations is a much more complex procedure, the information submitted to the Committee does not sufficiently substantiate the allegations of non-compliance with article 9 of the Convention in this case.

Minimum standards applicable to access to justice procedures – suspensory effect and injunctions (art. 9, para. 4)

87. With respect to injunctive relief, the communicant referred to a 2004 ruling of the District Court of Plzen (not a supreme court) relating to land use plans and injunctions, alleging that some courts continued to apply this argumentation. While the communicant conceded that some courts follow a different line, in its view it is "typical" that injunctive relief is not given. The communicant cited two other decisions to this effect.[27] However, from the oral and written submissions of both parties, it appears that there may be a shift in jurisprudence in granting suspensory effect or injunctive relief in environmental cases. The Committee considers that the communicant has not provided sufficient systematic jurisprudence to substantiate its allegations, that the criteria for injunctive relief are too restrictive. Therefore, the Committee cannot, in this case, conclude that the Party concerned fails to comply with the requirements in article 9, para. 4, for adequate and effective remedies and timely procedures in respect of injunctive relief in environmental cases.

IV. Conclusions and recommendations

88. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

89. The Committee finds that:

(a) through its restrictive interpretation of "the public concerned" in the phases of the decision-making to permit activities subject to article 6 that come after the EIA procedure, the system of the Party concerned fails to provide for effective public participation during the whole decision-making process, and thus is not in compliance with article 6, paragraph 3 of the Convention (see para. 70 above);

(b) by failing to impose a mandatory requirement that the opinions of the public in the EIA procedure are taken into account in the subsequent stages of decision-making to permit an activity subject to article 6; and by not providing opportunity for all members of the public concerned to submit any comments, information, analyses or opinions relevant to the proposed activities in those subsequent phases, the Party concerned fails to comply with the requirement in article 6, paragraph 8, of the Convention to ensure that in the decision due account is taken of the outcome of the public participation (see para. 71 above);

(c) the rights of NGOs meeting the requirements of article 2, paragraph 5, to access review procedures regarding the final decisions permitting proposed activities, such as

[27] Decision of the District court in Brno of 23 January 2008, no. 31 Ca 156/2007; Decision of the District court in Usti nad Labem of 25 January 2010, no. 15 Ca 91/2008; Decision of the City court of Prague of 2 July 2007, ref. no. 6 Ca 7/2008.

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building permits, are too limited, to the extent that the Party concerned fails to comply with article 9, paragraph 2 of the Convention (see para. 78 above);

(d) by limiting the right of NGOs meeting the requirements of article 2, paragraph 5, to seek review only of the procedural legality of decisions under article 6, the Party concerned fails to comply with article 9, paragraph 2 of the Convention (see para. 81 above);

(e) to the extent that the EIA screening conclusions serve also as the determination required under article 6, paragraph 1(b), members of the public shall have access to a review procedure to challenge the legality of EIA screening conclusions; since this is not the case under Czech law, the Party concerned fails to comply with article 9, paragraph 2, of the Convention (see para. 82 above);

(f) by not ensuring that members of the public are granted standing to challenge the act of an operator (private person) or the omission of the authority to enforce the law, when that operator exceeds some noise limits set by law, the Party concerned fails to comply with article 9, paragraph 3; similarly, in cases of land use planning, by not allowing members of the public to challenge an act, such as a land use plan, issued by an authority in contravention of urban and land planning standards or other environmental protection laws, the Party concerned fails to comply with article 9, paragraph 3, of the Convention (see para. 85 above).

B. Recommendations

90. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends the Party concerned to undertake the necessary legislative, regulatory, administrative and other measures to ensure that:

(a) all members of the public concerned, including tenants and NGOs fulfilling the requirements of article 2, paragraph 5, are allowed to effectively participate and submit comments throughout the decision-making procedure subject to article 6;

(b) due account is taken of the outcome of the public participation, in all phases of the decision-making to permit activities subject to article 6;

(c) NGOs fulfilling the requirements of article 2, paragraph 5, have the right to access review procedures regarding any procedures subject to the requirements of article 6, and in this regard they have standing to seek the review of not only the procedural but also the substantive legality of those decisions;

(d) to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1(b) on whether a proposed activity is subject to the provisions of article 6, the public concerned as defined in article 2, paragraph 5, is provided with access to a review procedure to challenge the procedural and substantive legality of those conclusions;

(e) members of the public are provided with access to administrative or judicial procedures to challenge acts of private persons and omissions of authorities which contravene provisions of national law relating to noise and urban and land planning environmental standards.

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