Case ACCC/C/2010/50, Czech Republic

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I. Opening presentation of the communicant for at the public session, 12 April 2011

I will not repeat the individual allegations again, as they were summarized by the currator of the case. I will just add some remarks which could make the overview more comprehensive and explain also why we have decided to submit this kind of communication

In the Czech Republic, a **relatively special system of public participation in environmental decision-making** has been developed in 1990ies, granting **quite a high standard of environmental participative democracy**. **On the other hand**, it has shown soon that in many cases, **the possibility to participate often does not mean much for real protection of the environment**, as the arguments of the public use to be been neglected. With that regard, it also appeared soon that the **judicial protection of environmental rights, and of the right to participate in environmental decision-making, represents the weakest point of the whole system**. The courts either did not accept the lawsuits of the public concerned at all, or dealt with them only in a formal way, or, at the most, they decided on the cases too late and therefore with no real impact.

After ratification of the Aarhus Convention in 2004, the environmental NGOs believed that situation will change considerably, but these expectations were for the most part disappointed. No specific provisions or legislative acts (with one questionable recent exception) were adopted to implement the requirements of Art 9 of the Convention. **The judicial review of the environmental acts and omissions, subject to public participation (and in general) remains unreliable, slow and inefficient**. Many subjects, including the communicant have repeatedly and by different means reported about this situation to the responsible authorities, namely to ministries of environment and justice and to the (judges of the) administrative courts. We received some in theoretical level positive general responses, but little has changed in practice.

We therefore decided to submit to the Compliance Committee a communication which summarizes the most problematic aspects of access to justice in environmental cases in the Czech Republic, with regard to the requirements of Art. 9 of the Convention. We believe that this more general approach is appropriate for this situation, as some of the problems in our opinion need legislative remedies, while the others reflect long-lasting practice of Czech courts in numerous real situations and cases (as we have highlighted in the communication and in the answers on the questions of the CC).

I would like to emphasize that many of the problematic aspects of the Czech situation are related to the fact that the EIA procedure (which allows for broad public participation and trough which most of the requirements of art. 6 are met) is not an integral part of permitting procedures for the

activities according to Annex I of the Convention, but a separate process finalized by a non-binding opinion, which is only a basis for subsequent (binding) permits. This fact as such is not contrary to the Convention, but we believe it is a source of many of the alleged specific non-compliances, as it is combined with

a) **limited scope of parties entitled** to participate in the subsequent environmental decision making procedures, and
b) **the impairment of right doctrine, which strongly influences** the practice of the Czech courts both with regard to which kind of acts could be subject to judicial review and who – plus to what extent – can challenge such acts

The overall and fundamental deficit of the Czech system of access to justice in environmental matters, caused by these main reasons, is its ineffectiveness. It can be briefly summarized as follows:

1. It is possible for all the public concerned to participate in the EIA procedure, but with no possibility to directly challenge it outcomes at courts.
2. Only a limited part of the public concerned can participate in the land use permit procedure (which is the principal one for approval and location of the project) and to challenge it at court. However, it is literally impossible to obtain injunction relief in this court procedure. At the same time, it often takes place years after the EIA was finished. It often happens that when the courts cancels the permit, other subsequent permits are already issued and the investment is under construction or even finalized.
3. And finally, only a limited part of the public concerned can participate in the building permit procedure and challenge the permit at court. Theoretically they have better chances to obtain the injunction. However, this procedure does not deal with the fundamental question of whether the project can be approved or not, and consequently, also the courts do not want to deal with this question at this stage.

As a result, it is hardly possible for the public concerned to challenge the decisions, acts and omissions related to the environment effectively and at the early stage.

To make it worse, the Czech government is planning to diminish the scope of rights of the public concerned – namely the NGOs - either by excluding them from the scope of parties to the building permits or to completely them of the position of parties to the procedures with full rights in the procedure. This would definitely further diminish also the efficiency of the court protection. These plans were acknowledged by the Ministry of Environment itself in its written statement in response to Committee questions (point 15),

The ministry, in its statement, states that the sense of public participation in environmental decision-making is just "to advise the public authorities" about possible environmental risks of the investment. **We disagree that the goal of environmental protection can be met with this understanding of public participation role**. To meet its goal, it is in our opinion, at least in the Czech system, that the public should be able to participate in the decision making procedures with the full rights of the parties and be able to protect them at courts.

I am ready to clarify and answer any questions by the committee members. Thank you.

II. Concluding remarks (not presented at the public session)

To conclude, I would like to express our conviction that the alleged non-compliances of the Czech Republic with the Aarhus Convention requires 2 main types of remedies

Firstly, we believe there is a need of some legislative changes. If the whole system of environmental permitting (namely the position and character of EIA procedure in it) will not be reviewed more considerably, than at least following specific changes would be appropriate:

1. The scope of the participants to the procedures according to the Building Code, namely of the land use permit procedures, should be extended beyond the neighbouring owners of the real property.
2. The provisions regulating the right to challenge administrative omissions should explicitly state that it is also possible to ask the court to order the authority to start the procedure *ex officio.*
3. The provisions determining that in some administrative procedures, which outcomes strongly influences the environment and rights of the affected public (as the "noise exemptions" or the permits according to the nuclear act) should be changed.
4. NGOs should be explicitly entitled to (under some conditions) challenge the land use plans.
5. It would be also appropriate to re-formulate the conditions for obtaining injunctive relief (suspensive effect) in environmental matters, despite the problem can also be solved by the court interpretation of the current provisions.

Next to that, we are convinced that **the long term and established case-law of the Czech administrative courts on the field of review of the environmental permits, should be modified** namely with regard to following aspects:

1. It should accept and promote the interpretation that all members of the public concerned, including the NGOs, are entitled to challenge at courts both procedural and substantive legality of the decisions related to the environment, i.e. that the court shall review also the arguments targeting on the merits of the case (mostly conflict of the investment with environmental laws).
2. The courts should re-consider their assumption that the final outcomes of the EIA procedures cannot be subject to direct judicial review.
3. The courts should apply the legislative conditions for injunctive relieves (if they do not change) in less restrictive way in environmental cases

We are convinced that the executive, legislative and especially the judicial branch of the government will carefully follow the recommendations of the Compliance Committee. We would therefore like to ask the Committee for this kind of guidelines, which would for sure improve the overall situation with respect to access to justice in environmental matters, and thus also the standard of environmental protection as such, in the Czech Republic.