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Mrs. Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
United Nations
Economic Commission for Europe
Environment and Human Settlement Division
Palais des Nations, Room 429-4
CH-1211 Geneva 10, Switzerland

Reply to the additional questions of the Aarhus Convention Compliance Committee

concerning communication under reference number ACCC/C/2014/106

I.

THE PARTIES

A. Communicant

1. Name
2. Legal form
3. Date of incorporation
4. Registration
5. Identification number
6. Registered office
7. Nationality

1. Spolek V havarijní zóně jaderné elektrárny Temelín
2. Association under Act No. 89/2012 Sb.
3. 5 April 2001
4. Regional Court in České Budějovice, section L, file 3219
5. 26529084
6. Písecká 372, 391 65 Bechyně, Czech Republic
7. Czech Republic

B. CONTRACTING PARTY

8. Czech Republic

II.

9. The legal representative of *Spolek V havarijní zóně jaderné elektrárny Temelín* received on 8 June 2017 additional questions from the Aarhus Convention Compliance Committee (hereinafter referred to as "**the Committee**") following to the meeting of the Committee, which was held on 17 December 2015. The Committee has sent to the communicant questions relating in particular to the amendments to Act No. 100/2001 Coll., on the assessment of the effects of projects on the environment (hereinafter referred to as the "**EIA Act**"), which were adopted since the submission of the communication, and further developments in the practice of administrative and judicial authorities in the Czech Republic, as regards the argument raised by the communicant in his communication dated from 30 September 2013.

III.

10. Since the submission of the communication by the communicant, several amendments to the EIA Act were adopted by the Czech Republic in order to comply with the requirements to ensure legal protection in the process of environmental impact assessment. Amendments to the EIA Act were mainly reaction to the procedure initiated by the European Commission against the Czech Republic for violation of European law, which led to the bringing of an action before the European Court of Justice, which found an infringement of Article 10a (current article 11) of the EIA directive[1]. Adopted amendments to the law, however, failed to address the nature of the problem. Only when the Czech Republic was threatened with sanction of suspension of European funds payments, the adopted amendment brought important changes in the legislation of the EIA process, however after more than 10 years since the entry into effect of the EIA Act. Nevertheless, there are still issues that remain unresolved or inadequately resolved, where the result will depend on the practice and judicial interpretation.

11. Amendment to the EIA Act made by the Act No. 39/2015 Coll., which entered into effect on 1 April 2015, increased the rights of the public and, in particular, of the public concerned in the **subsequent procedures**, that shall be the procedures in which the decisions are issued under specific legislation to authorize location or realisation of a project assessed according to the EIA Act. Subsequent procedures will therefore be proceedings in which a decision is issued necessarily on the basis of binding opinion on the environmental impact assessment of the realisation of a project. It will be mainly proceedings regarding planning, construction and change in the construction before completion. The question remains, however, whether it will also be proceedings regarding early use and test operation or even occupancy consent if they deal with the impacts on the environment. These proceedings already relate to the use of the building (and not to the location or realisation of a project). Even in these proceedings it may be decided on the environment, typically the noise and air pollution limits are assessed only after the project is brought into operation, and based on these findings additional measures are imposed. Even conditions of the opinion on the environmental impact assessment often relate to these phases of authorisation, where the participation of the public concerned with regard to the amended version of the law in these cases is limited. **In relation to proceedings under the Atomic Act law the EIA Act does not give a definite answer on the question whether these proceedings be considered as a subsequent procedure, although it would have been good.**

[1] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

12. As general rule, the EIA process shall always be preceded by the issue of the decision in the subsequent procedures, but not opinions or binding opinions (such as the interference in the landscape), which can be issued before the commencement of the EIA procedure. Consequently, the EIA will not need to precede all decisions, but only those that authorize location or realisation of a project. If the public or the authorities concerned wanted to raise objections in the EIA procedure, for example to the extent of cutting down or interference with the life of protected animals and plants, the competent authority could simply reject that on grounds that these matters have already been decided. The communicant is convinced in this respect, that the national legislation allows to disregard the outcome of public participation and is therefore **in breach of article 6 paragraph 8 of the Aarhus Convention.**

13. On the other hand the communicant welcomes the strengthening of rights of the "**public concerned**" as participants in the subsequent procedure, by which the amended EIA Act, which shall be persons affected in their rights and obligations by a decision issued in subsequent proceedings, and also legal entities whose purpose is the protection of the environment and at the same time its main activity is not a business, that exist at least three years, as well as *ad hoc* legal entities with the same purpose that are supported by at least 200 people by their signatures. At the same time the communicant is concerned, to what extent the administrative authorities will deal with the comments of the public concerned, as in their practice to date the administrative authorities only allowed the objections of procedural nature, and in addition limited to questions of protection of nature and landscapes. In the current wording of the EIA Act the range of permitted objections of the public concerned is significantly extended, the risk remains, however, that the objections will be rejected for formal reasons, as this was the practice to date of the administrative authorities that failed to be changed even by the practice of the courts (see paragraph 11 of the supplement to the communication dated from 18. 9. 2014), **which can be a significant restriction of the right of access to the legal protection guaranteed by article 9 of the Aarhus Convention.**

14. With regard to the amended EIA Act, the courts shall always decide about granting suspensive effect to an action against decisions of administrative authorities issued in subsequent procedures or about the interim measures. Courts shall grant suspensive effect to the action, if there is a danger that the realisation of the project may cause serious damage to the environment. In addition, the courts shall decide on the action within 90 days from the date when the action was submitted to the court. However, in the opinion of the communicant, these conditions are not formulated unambiguously as they raise a number of questions. The first of all is, what shall be the realisation of the project, i.e. whether the suspensory effect will be reserved only for the cases of a building permits (on the basis of which the project is realised), and not for the cases of planning permits (which only places the project). This approach could be the source of many problems in practice, if the planning permit was not granted suspensive effect, on its basis the building permit would be issued and subsequently the planning permit would be annulled due to its unlawfulness. The second question is how courts will able to assess the threat of serious damage to the environment in a very short time limit of 90 days. **The communicant therefore remains concern that national legislation will not ensure effective remedy according to the article 9 paragraph 3 of the Aarhus Convention.**

15. At the same time, it is necessary to point out that the process of authorisation of nuclear facilities is in the Czech Republic still considerably fragmented. In order to establish a facility, it is necessary that the applicant obtains a variety of permits, starting from the positive opinion in the process of environmental impact assessment (EIA), followed by planning procedure regarding the location of the construction, construction procedure regarding the authorization of the construction and the occupancy permit procedure regarding the use of the construction under Construction Act No. 183/2006 Coll. (hereinafter referred to as the "**Construction Act**"), in which the participation of the public concerned is authorized. Further on, it is necessary to obtain the operation permit issued by the State Office for nuclear safety

under Act No. 18/1997 Coll. on peaceful uses of nuclear energy, in which the participation of public or even the public concerned is not authorized by law, not even to a limited degree. The only participant in this procedure is the applicant for the permit. Operation permit represents "final authorization" on the basis of which a nuclear facility is operated. The courts have repeatedly dealt with the possibility of the participation of non-governmental organizations for environmental protection in the present proceedings pursuant to section 70 of Act No. 114/1992 Coll., on nature and landscape protection, and eventually the interpretation of the Supreme Administrative Court was settled, which allows only a limited participation of the public concerned in the case of a procedure relating to the nuclear facility newly brought into operation, or to an extension or increase in the capacity of a nuclear facility, on the grounds that by these cases the interests of the protection of nature and the landscape can be really affected, as opposed to cases of the continuation of existing operation (e.g. authorization of extension of the existing operation of the Dukovany nuclear power plant, which according to the court does not interfere with the environment)[2]. The communicant cannot identify with this opinion and insists that **national legislation is not in conformity with article 9 paragraph 3 of the Aarhus Convention.**

16. It cannot be overlooked that in the legislative process is currently discussed the amendment to the Construction Act that may have serious negative consequences on the participation of public in the proceedings according to this Act. From the large number of submitted amendments to the project of the Act, the communicant perceives as considerably problematic the one, on the basis of which the participation of non-governmental organizations for environmental protection in planning and construction proceedings under article 85 paragraph 2 letter c) of Construction Act, which affect the interests of the protection of nature and the landscape. The aforementioned amendment was adopted in both the Chamber of Deputies and in the Senate of the Czech Republic, that referred the amendment to the Construction Act to the Chamber of Deputies together with other amendments. In the event that the Act was adopted in the wording of the proposed amendment, there would nobody from the public who would oversee compliance with the law and with the public interest in the protection of nature and the landscape in proceedings in which is decided on projects affecting the protection of nature and landscapes, which are not subject to the EIA Act, that was always guaranteed through limited rights of aforementioned non-governmental organizations. The amendment to the Construction Act in the provisions of article 4 paragraph 9 to 11 also introduces new conditions for the review of binding opinions issued by the authorities concerned, which shall be authorized only based on appeal of the party to the proceedings against the subsequent decision and in addition within one year from the issuance of the opinion that may expire before the issuance of the subsequent decision. The review of unlawful binding opinions would thus be completely ruled out. **The communicant is convinced that this approach is not in accordance with article 6 paragraph 8 and article 9 paragraph 3 of the Aarhus Convention.**

IV.

SUMMARY

17. **In the opinion of the communicant his rights guaranteed under the Aarhus Convention are still being violated. Despite the amendments to EIA Act there are still issues that remain unresolved or inadequately resolved, whose solution the legislator left on the practice of administrative authorities and decisions of the courts. The communicant therefore, in view of the above, insists on its own communication in its entirety.**

[2] The decision of the Supreme Administrative Court, reference number 7 As 90/2011-144 from 27 October 2011, uphold by the resolution of the Constitutional Court, reference number IV. ÚS 463/12 from 11 June 2012.

V.

DATE AND SIGNATURE

18. Tábor, Czech Republic, on 23 June 2017
19. Stamp and signature

Digitálně podepsal
Mgr. Hana Líkařová

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JUDr. Martin Šíp
i.s. Mgr. Hana Líkařová