

In Prague on 16<sup>th</sup> of December 2015

**Summary of the Communication**  
**to the Aarhus Convention Compliance Committee**  
*about deficiencies in the transposition of the Aarhus Convention into the Czech law,*  
*in particular Art 6 sections 3, 8 and Art 9 sections 2, 3, 4 of the Convention*  
**filed on 30 September 2013**

*Reference of the Communication: ACCC/C/2014/106*

PARTIES

A. Individual complainant

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1. Name
  2. Legal form
  3. Date of incorporation
  4. Registration
  5. Identification number
  6. Registered office
  7. Nationality
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1. **“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. Všemyslice, Neznašov 122, 373 02 Všemyslice, Czech Republic
  7. Czech Republic
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B. PARTY TO THE AARHUS CONVENTION

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8. Czech Republic

9. The Communicant is a non-governmental, non-profit organization (“NGO”), incorporated as association with the full capacity of a legal person under the Czech National Law (under Act No. 89/2012 Sb.) The Association’s registered office is in Všemyslice, Neznašov 122, a village in Southern Bohemia located very close to the Temelín Nuclear Power Plant. The Association’s main goal and aim is the protection of the environment and landscape as well as protection of the interests of citizens concerned about nuclear energy. The Association was set up by people who live near the Temelín Nuclear Power Plant in order to help them defend their rights and interests more effectively. The Association is represented by Association Committee or a member appointed by the Committee who is currently Mr. Vladimír Halama. Unfortunately no member of the Association was able to attend the meeting of the Committee personally. The Association hereby authorizes Mr. Thomas Alge to represent the Association at the meeting of the Aarhus Compliance Committee held on 17th December 2015 in Geneva.
10. The Communicant has unique experiences with the authorization procedures of nuclear facilities as the Association participated in most of the procedures since the formation of the association in 2001 until 2013. His observations are based on authorization procedures relating to:

- Operation permit of block 1 and 2 of the Temelín Nuclear Power Plant
- Authorization of operation of block 1 and 2 of the Temelín Nuclear Power Plant
- Authorization of storage of spent nuclear fuel of the Temelín Nuclear Power Plant
- Extension of emergency preparedness zone of the Temelín Nuclear Power Plant
- Replacement of nuclear fuel in Temelín Nuclear Power Plant
- Planning and building permit for the storage of spent nuclear fuel of the Dukovany Nuclear Power Plant
- Extension of operation license of block 1 and 2 of the Dukovany Nuclear Power Plant

The Association also participated in the authorization procedures for block 3 and 4 of the Temelín Nuclear Power Plant.

11. Based on these wide experiences the Communicant sees the main issues in the following:
- In some cases of administrative proceedings relating to authorization of nuclear facility, the association wasn’t allowed to participate in it. For example in the proceedings under law on nuclear energy, where the impact of radiation of the nuclear facility on the environment was supposed to be considered, however the only participant was the claimant, which is the energy company. Therefore the association isn’t even entitled to file action for review of these administration decisions.
  - The objections of public concerned are dealt only in formal and not substantive matter. For instance if the association makes objections regarding the assessment of the impact of the nuclear facility on the environment, these are not considered in the authorization proceedings. In the case of authorization of block 1 and 2 of the Temelín Nuclear Power Plant happened that the administrative authorities referred the association with their objections to the following or other stages of authorization procedures (where they are mostly not allowed to participate) and in these stages they were told that these questions were already considered in the previous stages.
  - The administrative authorities concerned are not able to evaluate themselves the impact of nuclear facilities on people’s health and environment, as they don’t have a methodology for it or any necessary documentation. This question isn’t even considered by the experts, as their reports are not allowed.
  - The actions filed to the courts and their decisions have no suspensive effect. For example if the planning decision is cancelled, this decision is not effective if the nuclear facility was already built in the meantime and it isn’t possible to reverse it.

12. The Czech Republic signed the Aarhus Convention on 25<sup>th</sup> June 1998 and ratified it on 6<sup>th</sup> July 2004. The Aarhus Convention entered into force on 4<sup>th</sup> October 2004 when it was officially published in the Collection of International Agreements under Act no. 124/2004. However, the Communicant's experience with the interpretation and application of the Aarhus Convention has been that not only the Convention is not given application precedence over the National Law, but its direct effect, i.e. immediate applicability, in the Czech National Law is not even recognized.

13. The Communicant believes that the Czech National Law, and its application practice, are in conflict with Article 9 section 2 of the Aarhus Convention by restricting Access to Justice to the members of the public concerned and making this access, in practice, minimalist contrary to the guarantees given under the Aarhus Convention. Access to a review of administrative decisions by independent courts is further restricted by the Constitutional Court's interpretation according to which associations cannot invoke the right to a healthy environment as such right may only be claimed by natural persons, not legal persons. This interpretation deprives the public concerned – as represented by associations – of Access to Justice.

According to the Czech courts' interpretation, Associations may only seek a court review of procedural rights, not substantive rights. Under the Czech National Law, Associations thus cannot object to factual (substantive) defects in approval/permission processes. Therefore, their right to seek effective court review of administrative decisions impacting the environment is not ensured. Often, the Administrative Authorities rely on the provision of Sec 114(2) of the Building Code - which provides that objections that were or could have been raised in the Planning Permission Procedure are to be rejected - when justifying their rejection of Associations' objections. However, neither the Administrative Authorities, nor the courts interpret or apply this provision of the Building Code in accordance with its true contextual meaning – which is that objections are to be rejected where they were not properly raised in the course of the Planning Permission Procedure or, if they were raised, where they were properly dealt with and examined on their merits. Where a participant's objection is not examined on its merits in the Planning Permission Procedure, it cannot be simply rejected without remedy in the Building Permission Procedure. Due to deficient transposition of the EU regulations into the Czech National Law, the European Commission initiated infringement procedures against the Czech Republic which eventually lead to the filing of an action against the Czech Republic with the European Court of Justice for non-conformity of the Czech National Law with Article 10a of the EIA Directive. In response, an amendment to Act No. 100/2001 Sb., on Environment Impact Assessment, was passed; however, the amendment still fails to meet all the requirements for Access to Justice in the EIA Procedure and does not change the established practice in any meaningful way. **The Communicant thus believes that the Czech Republic has failed to fully and properly transpose Article 9 section 2 of the Aarhus Convention into the Czech National Law since, under said Article, members of the public concerned shall have access to a review procedure to challenge the substantive and procedural legality of any (administrative) decision, act or omission subject to the provisions of Article 6 of the Convention.**

14. The approval process for nuclear facilities is rather fragmented in the Czech Republic. In order to build and run a nuclear facility, the applicant must be granted a number of permissions and approvals, starting with a positive EIA Procedure result (EIA Opinion), a procedure which, in the Czech Republic, is not included in the "Building Permission Procedure", and, in addition, its result, i.e. the EIA Opinion, is not reviewable as it is not considered to be a decision; following are the Planning Permission Procedure, Building Permission Procedure and Occupancy/Operation Permit Procedure under the Building Code, where participation of the public is allowed - but restricted to the Planning Permission Procedure; **and the objections raised are not reviewed in their factual/substantive respects.** The final step is the Commissioning Permission (granted by the State Office for Nuclear Safety under Act No. 18/1997 Sb., on Peaceful Utilization of Nuclear Energy) Procedure where no participation of the public concerned, or even general public, is allowed. The Commissioning Permission is the so-called "final pass" allowing the

facility to be put into full operation.

The public concerned is thus granted access to participation only in certain marginal phases of the whole approval process. Concurrently, the Czech courts respond to exceptions about the impossibility of a court review of administrative decisions on nuclear facilities by commenting that citizens associations may challenge certain related phases of the approval process and that it is not necessary that they have access to all the phases of the process. **The fact that a court review of the Planning Permission Procedure is wholly insufficient and ineffective, inter alia because these actions do not have suspensive effect, is subject to no concern or commentary of the courts.**

Generally, it can be said that the Czech courts of all instances, including the Constitutional Court, dismiss an overwhelming majority of associations' actions against nuclear facilities (both in claims for the right to participate in administrative procedures and in disputes where they have been admitted as participants). The only statistical exception is freedom of information disputes where the courts mostly admit the citizens associations' objections (unfortunately, due to the delaying tactics of the State Office for Nuclear Safety, the information is, as a rule, still unlawfully denied despite the court's decision and released so late in the process that it becomes meaningless).

Furthermore, certain tendencies can be discovered in the reasoning given by courts for their decisions whereby they dismiss the associations' actions due to the lack of legal standing. When associations invoke their constitutional rights, a legal opinion is upheld that the right to privacy and the right to healthy environment are deemed by the Constitutional Court of the Czech Republic to be personal rights of natural persons which cannot be claimed or enforced by associations (through which the natural persons associate), the immediate applicability of the Aarhus Convention and the EIA Directive is denied and suspensive effect is not granted to associations' actions. The courts continue to refuse to apply the provisions of Article 36 sections 1 and 2 of the Charter of Fundamental Rights and Freedoms and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to citizens associations, arguing that citizens associations do not have the right to judicial protection unless their fundamental substantive rights are the subject matter of the proceedings. And, the courts in essence never consider the merits of associations' objections. In view of the concerns over the dangers and risks of nuclear plants – for which there are good reasons given the experience of the last decades (Chernobyl) or even the last years (Fukushima) – this attitude and practice of the Czech courts is less than understandable.

**Based on its many years of practice and experience, the Communicant is convinced that the Czech National Law is not conform with Article 9 section 3 of the Aarhus Convention because the Czech Republic systematically and consistently prevents members of the public concerned from access to judicial protection and a court review of the most significant administrative procedures whereby decisions are adopted on crucial issues of approval for the commissioning of nuclear facilities or setting up of spent nuclear fuel storages.**

15. The Czech procedural rules do not set statutory deadlines within which courts must decide a case. In addition, filing an action against a decision adopted by the Administrative Authorities does not have suspensive effect under the provisions of Sec 73 of the Administrative Procedure Code. It is true that the administrative court may grant suspensive effect to the action upon the plaintiff's motion; however, this is rarely the case in practice. For these reasons, it is often so that the case is only decided after the construction of the facility in question has been fully completed (substantial investments were made etc.) or after the facility has been commissioned and is operative. As long as the courts refuse to grant suspensive effect for citizens associations' actions, arguing that the citizens association is not able to demonstrate a risk of irreparable damage, the right to judicial protection will remain theoretical and the judicial protection ineffective. **The Communicant believes that on the point of Access to Justice (judicial protection), the Czech National Law is further in conflict with Article 9 section 4 of the Aarhus Convention.**

16. The EIA Procedure is regulated in the Czech Republic under Act No. 100/2001 Sb., as amended. The EIA Procedure is a separate procedure, which is not included in either the Planning Permission Procedure, or the Building Permission Procedure. The outcome of the EIA Procedure is the issuance of an Opinion (EIA Opinion) on whether the project assessed should or should not be implemented on the basis of environmental impact assessment of all its aspects and foreseeable consequences. Under the Czech National Law, the EIA Opinion is not directly reviewable as it is not considered to be an administrative decision.

On the issue of reviewability of the EIA Opinion, the Supreme Administrative Court's Case Law holds that the fact that the EIA Opinion is not directly reviewable does not mean a violation of the Aarhus Convention or a violation of Article 10a of the EIA Directive since the legality of the EIA Procedure, i.e. including the EIA Opinion, may be reviewed under an action against the subsequent approval procedure, i.e. typically the Planning Permission Procedure. The Supreme Administrative Court's ruling no. 1 As 13/2007-63 dated 29 August 2007 holds that: *"the provision of the Article 9 of the Aarhus Convention cannot be interpreted as calling for a separate court review of any decision, act or omission subject to the provisions of the Article 6 of the Convention in separate proceedings; it is sufficient to provide access to such review at a time when such decisions, acts or omission start factually affecting the legal interests of natural and/or legal persons."*

**The communicant repeatedly complained that that this interpretation is not conform with the requirement for adequate, effective and timely remedies called for under Article 9 section 4 of the Aarhus Convention as it still applies here that the range of persons that are given the legal standing to challenge the subsequent approval procedure is much more narrow than the range of persons allowed to participate in the EIA Procedure. Therefore, the exclusion of the possibility of direct review of the EIA results (EIA Opinion) represents a violation of Article 9 section 2 of the Aarhus Convention.**

In the opinion of our client, the impact of new EIA legislation with regard to the rights of public concerned is rather negative. It remains very difficult for the public concerned to access the proceedings and to obtain relative information about projects. The administrative authorities concerned still fail to defend the public interest when issuing their opinions as the political and economic interests prevail over the protection of environment.

17. The hopelessness of the whole situation has further been demonstrated by the approach of the **European Court of Human Rights** which, after having consolidated three qualified complaints filed by the Communicant during the period from October 2008 to December 2009 into one case, dismissed the case. No reasons have been given for the Court's decision, even after our written request (and yet, each of the complaints filed, and subsequently consolidated by the Court, concerned different matters – namely, participation in the approval process for the opening of the Temelín Nuclear Plant, extension of the nuclear plant's emergency preparedness zone and the role of the administrative authorities concerned in the administrative procedures concerning nuclear facilities).

Before filing our complaints with the European Court of Human Rights, we approached the **Czech Public Advocate** – Ombudsman, but also without success. Neither the ombudsman provided us with acceptable reasons for his refusal to act vis-à-vis the administrative authorities' actions/omissions in the administrative procedures concerned.

18. The critical point is that the so-called **administrative authorities concerned** keep issuing their Opinions without any regard to the provisions of the applicable laws and special regulations, thus failing to defend public interest, i.e. primarily the protection of citizens' lives and health, protection of nature and landscape and promotion of healthy environment and good living conditions. In this connection, no attention is paid to possible consequences of beyond-design-basis-accidents / severe accidents of

nuclear facilities which may have fatal ramifications for large areas and transboundary effects, either.

The associations are confronted with completely incomprehensible refusal of the administrative authorities to assess the safety of licensed nuclear facilities. The State Office for Nuclear Safety has currently no data on possible scenario of severe nuclear accident, even though it is explicit and necessary requirement of the Act no. 100/2001 Sb. on the assessment of the impacts of projects on the environment. In the process of assessing the impacts of the projects on the environment it should thus be considered a consequence of a severe accident on the environment, life and human health associated with the release of significant quantities of radionuclides into the environment which requires fatal intervention in the life of the population (evacuation, losses of lives, irreversible health damages, environmental damages, losses of property etc.).

The reason for this misconduct is that the administrative authorities concerned do not have any necessary documents for this evaluation since the impact of severe accidents on the biosphere is currently being examined. The administrative authorities proceeded in the same way in the case of the authorization of nuclear reactors in Temelín that are considerably more dangerous.

19. In general terms, it can be stated that the courts in the Czech Republic, at all levels, including the Constitutional Court of Czech Republic, are in most cases dismissing the actions of associations against nuclear facilities (both in the procedures relating to participation in administrative proceedings and as well as in disputes, where the associations are recognized as the parties). The only exception represent the information disputes where the courts meet the objections of associations and grant the right to information, however the practice of the State Office for Nuclear Safety is that they withhold the information contrary to the court's decisions or the information is usually provided with delay when it has no use for the authorization procedures.
20. The Communicant strongly believes that the present communication differs from the communication ACCC/C/2010/50 that was previously considered by the Committee as it was mentioned in the Supplement to the Complaint dated from 18.9.2014. The main issues of the present communication are the limited access to justice, the fact that the courts review issued decisions only in procedural and not substantive matter and no suspensive effect of actions filed in the Czech Republic.

V havarijní zóně jaderné elektrárny Temelín