

Statement of the Czech Republic in regard to ACCC/C/2014/106

3.1. Article 6, paragraphs 3 and 8 of the Aarhus Convention (Public participation in decision-making)

In order to assess the compliance of the Czech legislation with Article 6, paragraphs 3 and 8 of the Aarhus Convention, it is first necessary to deal with the scope of this provision, as defined in Article 6, paragraph 1 of the Convention. Here, the text states, that the provisions of Article 6 shall be applied by the parties with respect to the decisions on whether to permit the proposed activities listed in Annex I, and furthermore also with respect to the other decisions on the proposed activities not listed in Annex I but having potentially a significant impact on the environment.

The scope of activities listed in Annex I of the Convention is identical to the scope of activities that according to the Czech legislation mandatorily fall under the environmental impact assessment process (EIA). The EIA process by itself may not be considered to represent a sufficient fulfilment of the provisions of the Convention, but it is the legal arrangement of the EIA process in the Czech Republic (Act No. 100/2001 Coll., on environmental impact assessment, hereinafter the “EIA Act”) that provides for the public and the public concerned the extensive rights that can be exercised not only within the EIA process, but also in proceedings following the EIA process in which decisions are made on the placement and execution of the projects assessed in the EIA process. In the Czech Republic the public participation in these proceedings is regulated by the EIA Act and therefore public involvement in the decisions concerning the activities listed in Annex I of the Convention (and potentially any other activities assessed under the Czech legislation on EIA) is described in a separate subsection (3.1 .1).

With respect to the activities not listed in Annex I, the Convention states that the parties shall apply the provisions of Article 6 to these activities in accordance with their national law. It is left to the discretion of the Convention Parties which activities will be subject to the obligations provided in Article 6 of the Convention. Particularly, within the scope of this article projects will be included that do not fall within the mandatory EIA assessment process which, however, based on the screening performed, have an established obligation to perform the EIA process. Subsequently, the provisions of the EIA Act governing the public participation in proceedings in which decisions are made on the placement and execution of these projects will be applied.

In the case of activities which are not subject to the EIA process, the regulation of public participation is to a certain extent different from the EIA Act, but also for these activities the objectives of the Aarhus Convention are fulfilled, in relation to Article 6, paragraph 8, i.e. the objective to properly take into account the outcome of public participation. The public participation in the proceedings related to projects not subject to the EIA process will be also described in a separate subsection (3.1.2).

3.1.1 Public participation as established by the EIA Act As far as the decisions on the construction of nuclear power plants is concerned, i.e. the main subject of the complaint filed, these decisions fall under the provisions of Article 6, paragraph 1(a) of the Convention, because nuclear power plants are listed in Annex I of the Convention. These projects are mandatorily assessed in the EIA¹ process, and therefore the regulation of public participation under the EIA Act will fully apply to them.

In April 2015, an amendment to the EIA Act introduced extensive changes in the regulation of public participation in decision-making on projects assessed in the EIA process.

¹ Item 3.2 of Annex No. 1 of the Environmental Impact Assessment Act: "Installations with nuclear reactors (including their dismantling or decommissioning) except research installations whose maximum power does not exceed 1 kilowatt of continuous thermal load."

The first of these changes was the introduction of the concept of "public" and "public concerned" to the EIA Act, where these terms were not yet defined.² In formulating the definitions the legislator drew on the Aarhus Convention. Here, the public is defined as *"one or more persons"*³. The "public concerned" then refers to:

"1. a person who may be affected in his/her rights or obligations by a decision issued in a subsequent proceedings,

2. a legal entity of private law, whose subject of activity is according to its founding decree the protection of the environment or public health, and whose main activity is not business or other for-profit activity, which was founded at least three years before the date of the publication of information related to the subsequent procedure according to Section 9b, paragraph 1, or alternatively before the date of the decision issuance according to Section 7, paragraph 6, or supported by the signatures of at least 200 persons."

Especially the point (2) is relevant to this subsection, because this definition will be complied with by associations⁴, which are either established associations (i.e. associations that have been operating for at least 3 years) promoting environmental protection, or associations that have the support of the required number of citizens, as demonstrated by a list of signatures with at least 200 signatures. These criteria have been chosen so as not to restrict the possibility of associations to become parties to the proceedings in which decisions are made on the implementation of the project assessed in the EIA process, but, to allow such participation only to entities possessing certain legitimacy, in view of the extensive rights they would be granted as parties to the proceedings⁵. In order to facilitate the locution, this text will use for legal persons according to Section 3(i) (2) of the EIA Act the term *"association"*.

² But in fact, even before the adopted amendment to the EIA Act, the term public was actively used – the EIA Act spoke of “each person” - as well as the definition of the concept of a "privileged" group of entities having special rights enabling them to participate in decisions on projects and to seek judicial review.

³ Thereby the person shall be understood to represent a legal entity or a natural person

⁴ Prior to the entry into force of the new Civil Code (Act no. 89/2012 Coll.) these were the called civic associations. There was no change in the nature of these subjects; they are still volunteer-based non-profit entities consisting of at least of three persons.

⁵ The parties to the proceedings have e.g. the right to file appeals against the decisions or access the file, which represents significant procedural rights.

Another change relevant to the public participation was the introduction of the concept of a "subsequent proceedings" and special regulation of public participation in the decision-making in these proceedings.

Here, it is necessary to briefly outline the nature of the EIA process in the Czech Republic. In the Czech Republic, the EIA process is stand-alone, it is not integrated into processes in which development consent on project is taken, but precedes these processes and its result is the so-called "EIA binding opinion", which includes the assessment of the impacts of the project on the environment and lays down the conditions under which it is possible to allow implementation of the project in the subsequent proceedings.

The subsequent proceedings are those proceedings in which the development consent to projects is given and where the EIA binding opinion serves as a basis for such consent. The law defines it as: *"such a proceedings in which a development consent is given, pursuant to a special legislation that permits the placement or implementation of the project under consideration by the [EIA Act]."* This therefore includes all the proceedings in which conclusive development consent to project is given and thus is also decided the environmental issues.

With respect to the formulation of the complaint received, the decisive subsequent procedures will be the procedure pursuant to the Act No. 183/2006 Coll., on town and country planning and building code (hereinafter the "Building Act") and procedures pursuant to the Act No. 18/1997 Coll., on peaceful uses of nuclear energy and ionizing radiation (hereinafter the "Atomic Act"). Specifically, this will involve pursuant to the Building Act the town and country planning permission proceeding (hereinafter "planning permission proceeding") and construction proceeding, and pursuant to the Atomic Act the procedure for the placement of a nuclear plant, procedure on the construction of a nuclear plant and the procedure for granting the nuclear power plant operating permits. Within these proceedings, the decisions are made on the various aspects of the placement and construction of nuclear power plant. All of these proceedings meet the definition of the subsequent proceedings and therefore the provisions of the EIA Act shall apply for public participation, as described below.

Sections 9b to 9e of the EIA Act comprehensively regulate the public participation in the subsequent proceedings. This provision is a special arrangement for all subsequent proceedings and takes precedence over regulation of public participation in the acts, according to which these proceedings are conducted. The provisions of Sections 9b to 9e regulate in detail what documents and in what deadlines the administrative authority conducting the subsequent proceedings should publish and under what conditions the associations may become a party to the proceedings or seek judicial review of the decisions issued in such proceedings.

Article 6, paragraph 8 of the Aarhus Convention states that parties shall ensure *"that in the decision due account is taken of the outcome of the public participation."* In cases of decisions on activities that are assessed in the EIA process, this occurs in several ways.

One of the instruments utilized to achieve the objective of provisions of Article 6, paragraph 8 of the Convention is the EIA process itself. As already mentioned, in the Czech Republic the EIA process stands alone, it is not integrated into the processes in which development consents to project are taken but precedes these processes and its result is called the EIA binding opinion. The EIA process consists of several successive phases and all important documents – i.e. the documents serving as a basis for the EIA binding opinion ⁶ - are published and everyone has the opportunity to comment on them within the deadline by sending a written statement or by participating in the public hearing. In the public hearing the public may express their views orally and if needed, it can be an efficient tool for mediating communication between the investors, representatives of the administrative authority and the public⁷. **The settlement of the public comments received during the EIA process is**

⁶ These include:

- a) The notification submitted by the developer of the project (investor)
- b) The documentation which is a document elaborated by an authorized person (i.e. a professional entity) which contains a comprehensive description of the assessed project,
- c) A review report, which is also processed by an authorized person (in order to ensure objectivity the authorized person will be different from the authorized person processing the documentation), and to serve as a professional peer review of the documentation.

⁷ The public hearing is defined by the EIA Act as an obligatory step in the EIA process, which can be omitted only if the EIA authority has not received on the EIA documentation - which is a key document in the EIA process - any dissenting opinion. In practice, this means that a public hearing may be omitted only for uncontroversial projects where the public expressed no interest to comment. The implementing regulation to the EIA Act - Decree no. 457/2001 Coll. - states on the public hearing that it should be ensured *"that the place and*

according to the EIA Act one of the mandatory requirements of the EIA binding opinion. The Act also provides that the public comments received during the EIA process constitute the basis for the decision of the administrative authority in the subsequent proceedings.

The EIA process is followed by one or more subsequent proceedings in which decisions are made on issues of implementation of the project, i.e. its placement and execution. Also in the case of these decisions, the requirement of the Convention to ensure that the outcome of the public participation is duly taken into account is fulfilled, which is achieved in two ways. The first is the right of the public to submit comments on the project. The second is the participation of associations in these proceedings. For both of these ways of public involvement it is essential that all necessary information is provided.

The law stipulates that the administrative authorities carrying out the subsequent proceedings have an obligation to disclose information needed for the effective involvement of the public, the public has a right to submit comments on the projects in these proceedings and the associations may receive the status of a sui iuris participant in these proceedings.

Regarding the comments of the public, they can be submitted to the administrative authority (in accordance with the way how the EIA Act defines the concept of the public), by any natural person or legal entity. The public has 30 days (from the date of publication of information on the subsequent proceedings⁸) to submit these comments. **Settlement of the comments submitted during the EIA process is, under the EIA Act, a mandatory part of**

time of the public hearing correspond to the importance of the project with regard to accessibility, capacity of the venue and time to enable public participation."

A legal tool similar to the public hearing is provided by the Building Act. These are the so called project public oral hearings, which may be ordered by the building authority – the administrative authority managing the planning permission proceedings in the event that it makes a decision on a project that has been assessed in the EIA process.

⁸ This information consists primarily of the notice of proceedings initiation, the application along with the notification that the project is assessed according to this Act or that the project is subject to the assessment of environmental impact beyond the borders of the Czech Republic, along with information on where the relevant documentation of the subsequent proceedings may be inspected, information on the purpose and nature of the decision to be issued in the subsequent proceedings, information where the documents acquired during the assessment may be inspected, and information on the conditions of public involvement in the proceedings.

the EIA binding statement. The administrative authority is obliged to refer to this settlement in the grounds of the decision issued in the subsequent proceedings.

As noted above, the associations may become a party to the subsequent proceedings, thus giving them significant rights in the proceedings, especially the right to comment on the proceedings, the right to propose evidence, the right of access to the document file and the right to appeal against the decision issued. **The only condition to the right of participation is that the association registers with the administrative authority managing the subsequent proceedings within 30 days from the publication of the information referred to in the preceding paragraph.**

From the foregoing it follows that the EIA Act provides the public with a number of rights allowing it to participate in the decision-making on the project assessed in the EIA process. This arrangement undoubtedly meets the requirement of Article 6, paragraph 8 of the Aarhus Convention.

When making decisions on the construction of nuclear power plants in the Czech Republic, a broad and effective public access to the proceedings in which this decision takes place is thus ensured, and the public is provided with the means necessary to make this participation effective.

3.1.2 Public participation in the proceedings of projects not assessed in the EIA process

At the beginning of this subsection it is appropriate to reiterate that with respect to the activities not listed in Annex I of the Aarhus Convention, Article 6, paragraph 1(b) states that: *"[The parties shall] apply the provisions of this article - in accordance with [their] national law - also to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions"*. It is therefore clear that in the case of activities not listed in Annex I the parties have a certain amount of freedom in implementing the provisions of the Convention. The Aarhus Convention, An Implementation Guide, UNECE, 2014 (hereinafter Implementation Guide) states in general on the application of Article 6 of the Convention: *"Under the Convention, Parties have certain core obligations to*

put into practice. However, each party has some flexibility in how it adapts the Convention's obligations to its own national legal and institutional system."

The Guide discusses specific obligations which the parties to the Convention have in implementing the provisions of Article 6. The parties are inter alia obliged to "*conduct public participation early in decisions on activities with a possible significant environmental impact*", "*provide opportunities for the public to make comments*" and "*take due account of the outcome*" of public participation in proceedings addressing environmental issues. Subsequently, the Guide provides a demonstrative list of measures through which the parties have to fulfil these requirements. E.g. it is stated here: "*establish clear procedures for submitting comments in writing or at hearings,*" "*supervise how public authorities take comments into account*" and „*to establish clear procedures for promptly informing the public of the final decision.*"

From the text of the Convention and from the Implementation Guide it follows that the Convention does not require the parties to ensure that the concerned public entities receive full-fledged participation in the proceedings addressing environmental issues. The Convention requires that the parties provide to the public access to all relevant information concerning the environmental decision-making, the opportunity to submit comments on this decision-making, and ensure that these comments are duly taken into account when making the decisions. These objectives can be achieved also through other means than public participation in administrative proceedings, and the Convention gives the parties the opportunity to choose such instruments which they consider as most appropriate to achieve the objectives of the Convention.

In the decision-making on activities that have not been assessed in the EIA process, the public participation in decision-making is governed generally by Act No. 500/2004 Coll., Administrative Code (hereinafter the "Administrative Code"), Act No. 114/1992 Coll., on nature and landscape protection (hereinafter the "Nature and Landscape Protection Act") and acts governing individual administrative proceedings in which such decision-making takes place. The regulations governing the procedures of the individual proceedings are the Building Act, the Nature and Landscape Protection Act, Act No. 76/2002 Coll., on integrated

pollution prevention and control, on integrated pollution register and amending certain acts (hereinafter the "Integrated Pollution Prevention Act"), and Act No. 254/2001 Coll., on waters and amending certain laws (hereinafter referred to as the "Water Act").

3.1.2.1 Building Act

In the Building Act, the critical proceedings in which the public may participate are the planning permission proceeding and building permit proceeding. In the planning permission proceeding the decision is made on the approval of the project and conditions are set for the use and protection of the area and on the conditions for the preparation and implementation of the project. In the building permit proceeding the decision on the conditions for construction implementation and possibly the conditions of its usage is made. Therefore, these are the proceedings which address the critical issues that may have an impact on the environment.

The public may become a participant in the planning permission and building proceedings for several reasons.

The first one is the provision of the Building Act, which stipulates that both for planning permission and building proceedings that **the participants are also persons whose property or other property rights to adjacent buildings or adjacent land or buildings may be directly affected by the decision⁹**.

⁹ Section 85 of the Building Act:

"(1) The participants to the planning permission proceedings are

a) the applicant,

b) the municipalities within whose territory the requested project is to be implemented.

(2) Furthermore, the participants to the planning permission proceedings are

a) the owner of the plot or structure where the requested project is to be implemented, if this is not the applicant, or the person who has other substantive rights to this plot or structure,

b) the persons whose right of ownership or other substantive right to adjacent structures or adjacent plots on them may be directly impacted by the planning permission,

c) the persons stipulated by special legal regulation.

(3) The participants to the proceedings are not the tenants of apartments, commercial premises or plots."

Section 109 of the Building Act:

"The parties to the building permit proceedings shall only be:

a) the developer,

b) the owner of the structure on which the modifications are to be implemented, if he is not the developer,

c) the owner of the plot on which the construction works are to be done, if he is not the developer, should his right of ownership over the plot be directly affected by the construction works,

Whether someone's property or other property right is directly affected is assessed by the administrative authority managing the proceedings based on the specific circumstances of the particular case and the same approach is applied to the adjacent structures or adjacent land.

The second reason enabling public participation in the proceedings pursuant to the Building Act, are the provisions of Section 70 of the Nature and Landscape Protection Act¹⁰. Here, it is stated that the **associations¹¹ whose main mission, according to their statutes, is the nature and landscape protection, have the right, if they request so, to be informed of all commenced administrative proceedings where the interests of nature and landscape protection may be affected and they may become a party to these administrative proceedings on the basis of their notification of participation to the administrative**

d) the owner of the structure on the plot on which the construction works are to be done, and the person who has rights corresponding to an easement to a land plot or structure, should his rights be directly affected by the construction works,

e) the owner of adjacent plots or structures, should their right of ownership be directly affected by the construction works,

f) the person who has rights corresponding to an easement to a land plot, should those rights be directly affected by the construction works,

g) a person, as provided by special regulations, should protected public interests pursuant to special regulations be affected by the building permit, and these matters were not decided by the planning permission."

10 Section 70 of the Nature and Landscape Protection Act:

Participation of Citizens

(1) Nature protection according to this Act shall be carried out with direct participation of citizens, through their civic associations and voluntary groups or initiatives.

(2) A civic association or its organisational unit the main mission of which, according to its statutes, is nature and landscape protection (hereinafter "civic association") shall be entitled, provided it has a legal personality, to request that the relevant state administration authorities inform it in advance of all intended interventions and initiated administrative proceedings which could affect interests of nature and landscape protection protected according to this Act. The request is valid for the period of one year from the day of its filing, and may be filed repeatedly. It must be specified concerning its matter and locality.

(3) Under the conditions and in the cases pursuant to paragraph 2, a civic association shall be entitled to participate in administrative proceedings, provided it submits, in writing, a notification of its participation within 8 days of the day when the respective administrative authority notified it of the initiation of the proceedings; in this case, it is in a position of a party to the proceedings. The day of notification of the initiation of the proceedings shall be regarded as the day of its delivery in written form, or the first day of its publication on the official board of the administrative authority, and, simultaneously, in the way enabling remote access.

¹¹ The provisions of the Act mention civic associations, because it is legislation that was enacted before the adoption of the new Civil Code, which, refers to associations instead of civic associations. However, the arrangement applies to both the civic associations founded before the coming into effect of the new Civil Code and to the associations established under the currently applicable legislation. For the sake of consistency in the text, the term "associations" will be used.

authority¹² managing the proceedings. The association which does so has the status of a party to the proceedings.

The Building Act establishes for the planning permission proceedings that a party to the proceedings is also an entity determined by special legislation. Such special legislation is also the Nature and Landscape Protection Act and the **associations thus may, in accordance with Section 70 of the Nature and Landscape Protection Act, on the basis of this Act, become parties to the planning permission proceedings.**

A similar provision applies to the building permit proceeding, however with the difference that the party to the proceedings is the entity determined as such by special legislation, if the building permit (a decision issued in the building proceedings) may affect the public interests protected by special legislation, where the subject matter has not been decided in the planning permission. The planning permission is issued in the planning permission proceedings and its main task is to approve the project and set the conditions for the use and protection of the area and determine the conditions for the preparation and implementation of the project. It follows that environmental issues should be resolved at this stage. This is also indicated by the fact that the nature conservation authorities under the Nature and Landscape Protection Act issue their decisions and binding opinions regarding their respective protected interests already in the planning permission proceedings. The aforementioned seeming restriction of participation of civic associations in building proceedings therefore does not interfere with the effective participation of civic associations in proceedings pursuant to the Building Act. **In case of issues not addressed in the planning permission proceedings and dealt with by the building authority only as part of the building proceedings, then the civic associations have the opportunity to become participants in the building proceedings and to participate in the decision-making on these issues.**

It is also necessary to state, that in the case an association was denied participation in a building permit proceeding, this association may appeal against such decision and seek

¹² The only condition of participation in the administrative proceedings pursuant to Section 70 of the Nature and Landscape Protection Act is that the association asks to be informed on the initiation of the administrative proceedings in advance.

judicial review. In the Section 28, the Code of Administrative Procedure states: "*Should any doubts occur, a person who asserts his/her being a participant may be considered to be such until the contrary is proved.*" Whether or not the person is a participant shall be shown in a resolution issued by the administrative body. A participant who is notified about this resolution may lodge an appeal against it. He/she can also seek judicial review under Section 65 paragraph 1 of the Code of Administrative Justice: „***(1) Anyone who claims that their rights have been prejudiced directly or due to the violation of their rights in the preceding proceedings by an act of an administrative authority whereby the person's rights or obligations are created, changed, nullified or bindingly determined (hereinafter "decision") may seek the cancellation of such a decision, or the declaration of its nullity, unless otherwise provided for by this Act or by a special law.***"

As mentioned above, the participation in the proceedings is not the only means to achieve the objective of Article 6, paragraph 8 of the Convention, which requires the parties to ensure that "*in the decision due account is taken of the outcome of the public participation.*" The Building Act stipulates for the planning permission proceedings the possibility for the public to submit comments within a specified period. One of the statutory requirements for the planning permission is then, inter alia, the evaluation of the public comments. **Also in this way it is ensured that the public will be involved in the decision-making and the result will be reflected in the final decision.**

3.1.2.2 Other Laws

Also in the case of proceedings pursuant to acts other than the Building Act, the provisions of Section 70 of the Nature and Landscape Protection Act apply. The effective scope of this provision relates to a number of proceedings where the interests of nature and¹³ landscape are affected. The provision of Section 70 therefore currently serves as a kind of additional arrangement with respect to the EIA Act, as they apply to proceedings that are not subsequent proceedings pursuant to the EIA Act.

¹³ E.g. proceedings pursuant to the Forest Act, the Agricultural Land Protection Act, the Land Plot Adjustment Act, etc.

Some acts regarding the individual environmental components include their own customization of public involvement in the proceedings they regulate. This arrangement shall apply in the event that the proceeding is not a subsequent proceeding within the meaning of the EIA Act. These acts are the Water Act and the Integrated Pollution Prevention Act.

The Water Act establishes that an association whose aim is, according to its statutes, environmental protection, is entitled to be informed of administrative proceedings commenced under this Act, if the information is requested from the water authority and has the status of a party to the proceedings determined by this Act, if such position of a participant is requested within 8 days from the date of communication of information on the initiation of such proceedings. The legal arrangement is therefore similar to the Nature and Landscape Protection Act and the EIA Act and ensures the possibility of broad public participation.

The Integrated Pollution Prevention Act establishes that a participant in the integrated permit proceedings may be inter alia a civic association whose activity objective is the promotion and protection of public interests pursuant to special legislation (the Act expressly provides a reference to the Act No. 17/1992 Coll., on the environment), if the participant has registered with the authority in writing within 8 days of the publication of information on the application for an integrated permit.

Also in the case of proceedings which are not subsequent proceedings pursuant to the EIA Act, associations whose activities are focused on nature and landscape protection are allowed to participate.

3.2. Article 9, paragraphs 2 and 3 of the Aarhus Convention (access to justice)

On Article 9, paragraphs 2 and 3 of Implementation Guide states that the obligations of the parties under this provision include, in particular the obligation to ensure "*a judicial or other independent and impartial review of substantive or procedural legality*" and that "*standing requirements [be] determined in accordance with national law and with the objective of wide access to justice.*"

It follows from the above that the provision is not directly executable and it is not the fault of the courts that it is not interpreted in this manner. This interpretation is also supported by the EU Court of Justice interpretation e.g. of the cases C-240/09 or C-401/12. In the first of these judgments the EU Court of Justice stated that: *"It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure."* In the Czech Republic the access to justice is regulated by the Act No. 150/2002 Coll., Code of Administrative Justice (hereinafter "the Code of Administrative Justice"), which regulates the institute of the legal action against the decision of an administrative authority which may be used in defense by a party claiming that the decision or the proceedings of the administrative authority reduced its rights or by a party possessing the so called special complaint legitimation to protect the public interest.

The conditions for legal action against a decision of an administrative authority are regulated by the Code of Administrative Justice. In the case of a decision on projects assessed in the EIA process, the EIA Act establishes special complaint legitimation of associations to protect the public interest.

3.2.1 Access to judicial review according to the EIA Act

Pursuant to the EIA Act the associations have access to judicial review. An association may be a party to the proceedings in which the challenged decision has been issued, but the **participation in the subsequent proceedings is not a condition for an access to justice.** The only condition established by the law is to initially submit an ordinary remedy, i.e. an appeal, which arises from the principle of subsidiarity used in administrative justice within the Czech Republic. On this subject the law provides that an appeal may be submitted by the association *"even if it was not a party in the first instance proceedings."* The condition for filing an appeal therefore does not restrict access to judicial protection in any way.

Consecutively, the law provides the public concerned with complaint legitimization when it states that: *"The public concerned referred to in Section 3(i), point 2, may seek by a legal action an annulment of a decision issued in the subsequent proceedings and challenge substantive or procedural legality of this decision. For the purposes of the procedure under the first sentence it shall be deemed that the public concerned referred to in Section 3(i), point 2 has rights which may be reduced by the decision issued in subsequent proceedings."* It follows from the above that the regulation of access to judicial protection in the EIA Act fully meets the requirements of the Aarhus Convention, because it provides wide access justice within which it is possible to seek a judicial review of both substantive and procedural aspects of the issued decision.

It is necessary to mention here a situation when according to the EIA Act a notification of a project is submitted, but in the subsequent screening it is decided that this project will not be assessed in the EIA process. It is also possible to seek judicial protection against such a decision. The association has the right to file an appeal against this decision and subsequently may also seek judicial review of this decision and to challenge the substantive and procedural legality. **The access to justice is provided to the public concerned even if it is decided that the project will not be assessed in the EIA process.**

3.2.2 Access to justice in cases of projects not assessed pursuant to the EIA Act or for other entities than associations

The complaint legitimization in this case is governed by general provisions of the Code of Administrative Justice, where it is stated in Section 65:

„ (1) Anyone who claims that their rights have been prejudiced directly or due to the violation of their rights in the preceding proceedings by an act of an administrative authority whereby the person's rights or obligations are created, changed, nullified or bindingly determined (hereinafter "decision") may seek the cancellation of such a decision, or the declaration of its nullity, unless otherwise provided for by this Act or by a special law.

(2) A complaint against a decision of an administrative authority can be made even by a party to the proceedings before the administrative authority who is not entitled to file a complaint

under paragraph 1, if the party claims that his or her rights have been prejudiced by the administrative authority's acts in a manner that could have resulted in an illegal decision."

The judicial review under this provision may be claimed both by entities that were a party to proceedings pursuant to the arrangements described in subsection 3.1.2. (I.e. the parties to the proceedings in which the challenged decision was issued) and by those who were not a party to the proceedings, yet their rights were reduced by the decision issued.

From the quoted provision it follows that the access to judicial review of administrative decisions is in principle open to everyone who claims that his/her rights were reduced by such decision. Usually this will involve persons (legal or natural), who were parties to the administrative proceedings in which the challenged decision had been made, but this is not a condition.

The specialized literature, commentary on the Code of Administrative Justice on this issue states that: *"The plaintiffs will be natural or legal persons, typically administrative proceedings participants. Nevertheless the structure of paragraph 1 of the Code of Administrative Justice (unlike paragraph 2) does not necessarily require plaintiff's previous participation in the administrative proceedings. In terms of locus standi to file legal action it is therefore not decisive whether the concerned entity has been treated as a party to the administrative proceedings or not"*¹⁴

The courts act in accordance with this interpretation. The Supreme Administrative Court stated that *"to the filing of a complaint against the decision of an administration authority may exceptionally be entitled also such person who did meet the requirements for the participation in the administrative proceedings and who did not have the right to appeal against the decision of an administrative authority (Section 81, paragraph 1 of the Administrative Code from the year 2004). In such case it is not possible to condition the admissibility of a complaint (impermissible) by the filing of an appeal under the Code of Administrative Justice."* The Supreme Administrative Court in this case referred to the Aarhus Convention and to the need to interpret the domestic law from the perspective of the

¹⁴ Blažek, T., Jirásek, J., Molek, P. Pospíšil, P., Billet, V. Šebek, P. : *Code of Administrative Justice - online commentary*. 3rd update. Prague: CH Beck, 2014

Convention so as to achieve the objectives established therein: *"It must be stated that the provisions of article 9, paragraph 3 of the Aarhus Convention do not contain any clear and precise obligation, which could directly regulate the situation of individuals. In view of the fact that only "members of the public meet these criteria, if any, laid down in national law" have the rights established in the said article 9, paragraph 3, the implementation and effects of this provision depend on the release of a subsequent act. It should however be noted that the purpose of these provisions, even if they are formulated in general way, is to ensure effective protection of the environment. In case of absence of European Union legislation in this area, the domestic legal systems of each Member State are to lay down procedural rules governing legal actions intended to safeguard the rights which individuals derived from European Union law, (...) Thus it is up to the presenting national court to interpret the procedural law governing the conditions that must be met for the purposes of filing an administrative remedy or legal action in a way that to the greatest extent possible, reflects the objectives of Article 9, paragraph 3 of the Aarhus Convention, and as well the objective of effective judicial protection of the rights conferred by European Union law (...)" This interpretative guidance will need to be respected even when interpreting Section 65, paragraph 1 and Section 46, paragraph 1(c) of the Code of Administrative Justice in the case now under consideration.*"¹⁵

The associations and other organizations thus may obtain legal protection against the decision, if they prove that the issuance of this decision has reduced their rights, which is in line with the arrangement of Section 9, paragraph 2 which provides that access to justice may be conditioned by a "sufficient reason", provided that *"what constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention."*

Section 9, paragraph 3 of the Aarhus Convention then provides that: *"In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law,*

¹⁵ Decision of the Supreme Administrative Court ref. No. 4 As 157/2013 - 33 dated April 18, 2014

members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”

"The requirements of Section 9, paragraphs 2 and 3 are therefore satisfied also in the case of decision-making on projects that have not been assessed in the EIA process, and in the case of entities that are unable to seek justice under the provisions of the EIA Act.

3.3. Article 9, paragraph 4 (provision of adequate and effective remedy)

The Aarhus Convention in Article 9, paragraph 4 states that: *"In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."*

The wording of the abovementioned provision makes it clear that the Aarhus Convention provides to the parties a certain degree of discretion on the issue of injunctive relief arrangements, their forms and conditions for their award. This discretion is limited only by the purpose and objective of Article 9, paragraph 4. On this the Implementation Guide states: *„Injunctive relief is a remedy designed to prevent or remedy injury by requesting the addressee either to stop an activity or cease a violation, or to take certain measures."* Furthermore, it states: *„When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies also may issue an order to stop or to undertake certain action. This order is called an “injunction” and the remedy achieved by it is called “injunctive relief”. (...) In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or ongoing activities that present imminent threats to human health and the environment. In many cases, if left unchecked, the resulting damage to health or the environment would be irreversible and compensation in such cases is often inadequate."*

From the foregoing it follows that the Aarhus Convention does not require injunctive relief to be always awarded automatically, regardless of the circumstances of the case. Injunctive relief must be in such format and must be awarded under such conditions that permit the avoidance of irreversible damage to the environment, which is the purpose that must be reflected when interpreting the entire provision from this perspective.

In the Czech legal system two instruments are predominantly used for this purpose, provided in the Act No. 150/2002 Coll., Code of Administrative Justice (hereinafter "the Code of Administrative Justice"). These instruments are the preliminary injunction and suspensory effect and their application is decided by independent courts.

By a preliminary injunction a court may impose on the parties the duty to do something, refrain from doing something or endure something in case of a risk of serious harm and therefore it is necessary to adjust provisionally the legal relationship of the participants. The court may impose a preliminary injunction on a third party if it can be justly requested.

The award of suspensory effect withholds the effects of the contested decision until its review by a court. According to the Czech legislation a legal action against an administrative decision does not automatically have a suspensory effect. In any considered case this must be awarded by the court, which evaluates whether statutory conditions have been complied with. The conditions for awarding a suspensory effect of a legal action against an administrative decision are governed by the Code of Administrative Justice and in the case of a legal action against a decision made in subsequent proceedings pursuant to EIA Act, also by this Act.

The Code of Administrative Justice governs the conditions under which a court may award a suspensory effect. The court shall do so if *"the execution of the decision or other legal consequences of the decision would result in exceedingly higher damage to the complainant than it can arise to other persons by awarding the suspensory effect, and providing it is not contrary to the public interest."* The task of the court in this case is to take into account the specific circumstances and assess whether greater harm may result from the execution of the decision or from the suspensory effect. Furthermore, the public interest must

be taken into account, which doubtlessly also includes the interest in protecting the environment.

The conditions for the suspensory effect are defined differently in the EIA Act. This arrangement relates to the cases of administrative legal actions against the decisions issued in subsequent proceedings, but does not exclude the application of the provisions contained in the Code of Administrative Justice. The EIA Act states that: *"The Court shall decide on the award of the suspensory effect of a complaint or a preliminary injunction pursuant to the Code of Administrative Justice even without a petition. **The court shall award the suspensory effect to the complaint or order a preliminary injunction, if there is a risk that the implementation of the project may cause serious environmental damage.**"*

Also in the case of the EIA Act the law provides the court with the option to award suspensory effect on the decision or award a preliminary injunction if necessary for the protection of the environment.

The Supreme Administrative Court on the subject of award of suspensory effect stated that: *"This court adds that on the basis of these stated provisions of the Community law **the claimants from the public concerned must be satisfied in their proposals for suspensory effect of administrative legal actions so that situations are prevented, when at the time of making the decision on administrative legal action, the permitted project has already been irreversibly implemented (typically an execution of a construction).** If the petition to award suspensory effect would not be satisfied, this would represent a breach of Article 9, paragraph 4 of the Aarhus Convention and Art. 10a of the Directive 85/337 /EEC, because the provided court protection would not be timely and fair."*

From all the foregoing it follows that the Czech law, on the subject matter of the effectiveness of the access to judicial protection, complies with the Aarhus Convention. The purpose of the provisions of Article 9, paragraph 4 is to ensure effective protection of the environment, for example through injunctive relief. If there is a risk to the environment, the courts have the possibility to award suspensory effect against the decision, and then the decision may not be executed until it is reviewed for substantive

and procedural legality. The objective of Article 9, paragraph 4 of the Convention is thus fulfilled.