

Findings and recommendations with regard to communication ACCC/C/2013/106 concerning compliance by Czechia

Adopted by the Compliance Committee on 1 November 2019¹

I. Introduction

1. On 26 November 2013, association “V havarijní zóně jaderné elektrárny Temelín” (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure by Czechia to comply with its obligations under articles 6(3) and (8), and 9(2)-(4) of the Convention.
2. By letter of 12 March 2014, the Committee requested the communicant to clarify which of its allegations had not already been considered by the Committee in its findings on communication ACCC/C/2010/50.
3. On 26 August 2014, having received no reply, the secretariat forwarded the Committee’s letter of 12 March 2014 to the communicant again.
4. On 18 September 2014, the communicant submitted its reply to the Committee’s request for clarification.
5. At its forty-sixth meeting (Geneva, 22-25 September 2014), the Committee determined on a preliminary basis that the communication was admissible.
6. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 27 February 2015 for its response.
7. The Party concerned provided its response to the communication on 24 July 2015.
8. On 16 September 2015, the communicant submitted comments on the response of the Party concerned.
9. At its fiftieth meeting (Geneva, 6-9 October 2015), the Committee agreed to hold a hearing to discuss the substance of the communication at its fifty-first meeting (Geneva, 15-18 December 2015).
10. On 11 December 2015, the Committee sent questions to facilitate the parties’ preparation for the hearing and on 16 December 2015, the communicant submitted a revised summary of its communication.
11. At its fifty-first meeting, the Committee held a hearing to discuss the substance of the communication, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

12. On 21 November 2016, an observer, OEKOBUERO, submitted observations on the communication.
13. On 8 June 2017, the Committee sent questions to the communicant.
14. On 23 June 2017, the communicant provided its reply to the questions of the Committee and on 11 July 2017, the Party concerned submitted comments thereon.
15. On 12 January 2018, the Committee sent questions to the Party concerned and on 8 February 2018, the Party concerned provided its replies thereto.
16. The Committee completed its draft findings through its electronic decision-making procedure on 26 August 2019. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 28 August 2019. Both were invited to provide comments by 9 October 2019.
17. The Party concerned provided its comments on the draft findings on 9 October 2019. The communicant did not submit any comments.
18. After taking into account the comments received, the Committee finalized and adopted its findings through its electronic decision-making procedure on 1 November 2019 and agreed that they should be published as a formal pre-session document to its sixty-sixth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues²

A. Legal framework

Public participation

EIA Act

19. Act No. 100/2001 Coll (EIA Act) regulates the environmental impact assessment (EIA) procedure. On 1 April 2015, Act No. 39/2015 Coll., amending the EIA Act, came into force.³
20. Prior to the adoption of the 2015 amendment to the EIA Act, EIA procedures ended with a non-binding EIA opinion.⁴ Following the 2015 amendment, in accordance with section 9(a)(1) of the EIA Act as amended (the 2015 EIA Act), EIA procedures end with the adoption of a binding EIA statement.⁵
21. The 2015 EIA Act also regulates “subsequent procedures”, which are defined under section 3(g) of the 2015 EIA Act as a procedure in which, pursuant to special regulation, a decision is to be issued which permits the location and implementation

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

³ Communicant’s reply to questions from the Committee, 23 June 2017, para. 11.

⁴ ACCC/C/2010/50 (Czech Republic), ECE/MP.PP/C.1/2012/11, para. 25.

⁵ Party’s comments on the communicant’s reply to the Committee’s questions, 11 July 2017, p. 2, and English translation of selected provisions of the EIA Act provided by the Party concerned in the context of decision V/9f, 22 March 2017, p. 1.

of a project under consideration by the 2015 EIA Act.⁶ Footnote 1(a) to section 3(g) of the 2015 EIA Act lists some examples of such special regulations.⁷

22. With respect to public participation in subsequent procedures, section 9(c) of the 2015 EIA Act provides that:

(1) The public may submit comments on the project in a subsequent procedure. Comments may be submitted within 30 days of the date of publication of the information according to section 9(b)(1) on an official board of the authority responsible for conducting the subsequent procedure, unless a longer deadline is stipulated by a special legal regulation or by the administrative authority responsible for conducting the subsequent procedure.

(2) The administrative authority is obliged to refer to the settlement of the comments from the public in the grounds of its decision.⁸

23. Annexes 5 and 6 of the 2015 EIA Act also require that the EIA statement include a “settlement” of the comments received on the notification and on the expert report.⁹

24. The following entities may also become a party to the subsequent procedures if they register with the administrative authority responsible for the subsequent procedure by submitting a written notification within 30 days from the date of the publication of the information pursuant to section 9(b)(1) of the 2015 EIA Act:

- (a) The municipality affected by the project, or
- (b) The public concerned referred to in section 3(i)(2).¹⁰

25. Section 3(i)(2) of the 2015 EIA Act defines the “public concerned” in the EIA procedure and in subsequent procedures as:

“1. A person who may be affected in his/her rights or obligations by a decision issued in a subsequent procedures;

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 9(b)(1), or alternatively before the date of the decision issuance according to section 7(6), or supported by the signatures of at least 200 persons.”¹¹

Building Act

26. Act No 183/2006 Coll. on Town and Country Planning and Building Code (Building Act), as in force at the time of the most recent submissions on the Building Act received from the parties in this case,¹² regulates inter alia the planning permit

⁶ Party’s response to the communication, p. 4.

⁷ English translation of selected provisions of the 2015 EIA Act provided by the Party concerned in the context of decision V/9f, 22 March 2017, p. 1.

⁸ Third progress report of the Party concerned regarding decision V/9f, 31 October 2016, p. 2.

⁹ Ibid., and ECE/MP.PP/2017/38, para. 35.

¹⁰ Ibid., p. 1.

¹¹ Party’s response to the communication, p. 3.

¹² See the communicant’s reply to questions from the Committee, 23 June 2017, para. 16, and the Party’s comments on the communicant’s reply to the Committee’s questions, 11 July 2017, p. 2.

procedure and the building permit procedure. Section 85 of the Building Act determines who are participants to the planning permit procedure, namely the applicant and the municipalities within whose territory the requested project is to be implemented. Affected land owners, and persons stipulated by special legal regulation are also participants to the planning permit procedures. Tenants of apartments, commercial premises or plots are not participants to these procedures.¹³

27. Similarly, section 109 of the Building Act provides that the parties to the building permit procedure are the developer, the owner of the plot or structure where the project is to be implemented, should this not be the developer, persons whose property or other property rights to adjacent buildings or land may be directly affected by the decision and, should protected public interests pursuant to special regulations be affected by the building permit, and these matters were not decided by the planning permit, persons as provided by special regulations.¹⁴ Associations meeting certain criteria may also gain party status if they submit, in writing, a notification of their participation within 8 days of the day when the administrative authority notified it of its initiation of the procedure.¹⁵

28. Section 114(2) of the Building Act provides that objections that were or could have been raised in the planning permit procedure are to be rejected.¹⁶

Access to justice

29. Section 65(1) of the Act No. 150/2002 Coll., Code of Administrative Justice (Code of Administrative Justice), provides that:

“(1) Anyone who claims that their rights have been prejudiced directly or due to the violation of their rights in the preceding procedure 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 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.”¹⁷

30. Pursuant to section (9)(d)(1) of the 2015 EIA Act the public concerned referred to in section 3(i)(2) of that Act (see para. 25 above) are:

“entitled to bring a legal action to protect the public interest against the decision issued in a subsequent proceeding 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

¹³ Party’s response to the communication, footnote. 9.

¹⁴ Ibid.

¹⁵ Ibid, footnote 10.

¹⁶ Communication, para. 28.

¹⁷ Further information provided by the Party concerned in the context of the follow-up on decision V/9f, 31 January 2017, p. 6.

Section 3 (i), point 2, has rights which may be impaired by the decision issued in a subsequent proceeding.”¹⁸

31. Section 9(c)(4) of the 2015 EIA Act provides that the public concerned referred to in section 3(i)(2) may file an appeal against a decision issued in a subsequent procedure even if it was not a party to the administrative procedure.¹⁹

32. With regard to (i) the timeframe for a court to issue its decision on a legal challenge to a decision in a subsequent procedure and (ii) the granting of suspensive effect, section 9(d)(2) of the 2015 EIA Act provides that:

“The court shall decide on the legal actions against decisions issued in subsequent procedures within 90 days of the legal action being delivered to the court. The court shall decide even without a petition whether to grant suspensive effect to the legal action or order a preliminary injunction pursuant to the Code of Administrative Justice. The court shall grant suspensive 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.”²⁰

33. Aside from the 2015 EIA Act, section 73 of the Code of Administrative Justice provides that the filing of a complaint does not have suspensive effect unless otherwise provided for by that Code or a special law. However, courts shall award suspensive effect if the execution of the decision or other legal consequences of the decision would result in exceedingly higher damage to the complainant than would arise to other persons through the grant of suspensive effect, and providing it is not contrary to the public interest.²¹

B. Facts

34. In 2008, the communicant participated in the planning permitting procedure for the construction of a spent nuclear storage facility, submitting a number of comments and objections. On 14 April 2008, the competent authority granted the planning permit for the facility. The communicant sought administrative review but its administrative appeal was dismissed on 18 July 2008. The communicant challenged this dismissal in court and requested suspensive effect. Suspensive effect was refused. On 27 October 2010, the Municipal Court in Prague agreed with the communicant that its objections and the facts thereof had not been dealt with by the appellate authority and remitted the case to that body for another decision. However, the building permit had already been issued on 11 November 2008 and development of the facility had commenced.²²

¹⁸ See the third progress report from the Party concerned on the implementation of decision V/9f, 31 October 2017, p. 3.

¹⁹ Third progress report of the Party concerned with regard to decision V/9f, 31 October 2016, p. 3.

²⁰ Party’s response to the communication, p. 20. See the third progress report from the Party concerned on the implementation of decision V/9f, 31 October 2017, p. 3, for the text of the provision.

²¹ Communication, para. 36, and Party’s response to the communication, p. 19.

²² Communicant’s comments on the Party’s response to the communication, 16 September 2015, p. 3.

35. The communicant also brought a legal challenge demanding that the comments that it had submitted in the above planning permit procedure, which it considered had not been sufficiently taken into account in that procedure, be taken into consideration in the subsequent building permit procedure. This challenge was rejected by the Municipal Court of Prague on 11 May 2010, which reasoned that the planning permit procedure is the only procedure under the Building Act in which the association had standing to participate. This decision was upheld by the Supreme Administrative Court on 14 January 2013.²³

36. The communicant challenged the EIA opinion of the Ministry of Environment with respect to the construction of blocks 3 and 4 of the Temelin NPP. Its challenge was rejected by the Municipal Court of Prague on 5 April 2013 on the grounds that the opinion did not affect the communicant's legal interests.²⁴ This ruling was upheld by the Supreme Administrative Court on 4 June 2013.²⁵

37. In a judgment of 19 August 2014, the Supreme Administrative Court held that unincorporated associations whose main role was to protect nature and landscapes were entitled to participate in building permit procedures.²⁶

C. Domestic remedies

38. The communicant submits that it has exhausted all remedies available under the national law and that in many of its lawsuits, clear allegations as to the non-conformity of the national law with the Convention have been raised.²⁷ In this regard, the communicant points to its court proceedings before the Municipal Court of Prague and the Supreme Administrative Court (see paras. 34-36 above).²⁸

39. The communicant claims that it also applied to the Czech Ombudsman who, however, refused to act with regard to its allegations.²⁹

40. The communicant further claims that it applied to the European Court of Human Rights but that court dismissed the case without considering the facts of the complaints submitted.³⁰

41. The Party concerned did not comment on domestic remedies.

D. Substantive Issues

Article 6(1)

42. The communicant submits that article 6 of the Convention applies not only to the EIA procedure but also to other procedures, such as the planning permit procedure,

²³ Ibid., pp. 3-4.

²⁴ Communication, para. 19.

²⁵ Communicant's comments on the Party's response to the communication, 16 September 2015, p. 5.

²⁶ Ibid., p. 4.

²⁷ Communication, paras. 44-45.

²⁸ Ibid., para. 45.

²⁹ Communicant's reply to the Committee's request for clarification, 18 September 2014, para. 13.

³⁰ Ibid., para. 12, and communicant's comments on the Party's response to the communication, 16 September 2015, p. 5.

the building permit procedure, occupancy/operation procedures or any special building approval granted under special legislation for the permit to occupy or operate a building.³¹

43. The Party concerned does not dispute the applicability of article 6 to both the EIA and subsequent procedures.³² It submits that under its legislation all activities covered by Annex I of the Convention and consequently article 6(1)(a) of the Convention require an EIA procedure and that this includes the construction of nuclear power plants.³³

Article 6(3)

44. The communicant claims that the public is in practice only entitled to participate in the planning permit procedure, and that participation of the public concerned is not guaranteed in the building permit procedure.³⁴ The communicant claims that the Building Act restricts the participants to the applicant and to persons whose title of ownership could be directly affected by the construction.³⁵ The communicant also claims that the final step of permitting a nuclear power plant is the commissioning permitting procedure granted by the State Office for Nuclear Safety under the Act No. 18/1997 Coll., on peaceful uses of nuclear energy and ionizing radiation (1997 Atomic Act) and that section 14(1) of this Act does not allow participation of the general public or the public concerned.³⁶

45. In its reply of 23 June 2017 to questions from the Committee, the communicant acknowledges that under the 2015 EIA Act, planning, building and change in construction procedures will involve decisions issued on the basis of a binding EIA statement and are hence subsequent procedures governed by that Act. Yet the communicant submits that it is unclear whether procedures regarding early use and test operation or occupancy consent will be treated as subsequent procedures. It adds that, although it would have been good if it did so, the 2015 EIA Act does not give a definite answer on the question of whether procedures under the 1997 Atomic Act are considered as a subsequent procedure.³⁷

46. The Party concerned submits that in accordance with section 3(i)(2) of the 2015 EIA Act, associations that can present the support of 200 persons (proof by signature) are considered among the “public concerned” for public participation during the EIA procedures and in subsequent procedures.³⁸ The Party concerned states that the binding EIA statement, which is the result of the EIA procedure, serves as the basis for the development consents given in subsequent procedures.³⁹

47. The Party concerned states that sections 9(b)-(e) of the 2015 EIA Act regulate public participation in the subsequent procedures and take precedence over the regulation of public participation in the acts according to which these procedures are

³¹ Communication, para. 21.

³² Party’s response to the communication, pp. 1-2 and 7-8.

³³ Ibid., pp. 1-2.

³⁴ Communicant’s comments on the Party’s response to the communication, 16 September 2015, pp. 3-4.

³⁵ Communication, para. 21.

³⁶ Ibid., para. 31, communicant’s comments on the Party’s response to the communication, 16 September 2015, p. 6 and communicant’s reply to the Committee’s questions, 23 June 2017, para. 15.

³⁷ Communicant’s reply to the Committee’s questions, 23 June 2017, para. 11.

³⁸ Party’s response to the communication, p. 3.

³⁹ Ibid., p. 4.

conducted. It also claims that sections 9(b)-(e) regulate in detail what documents should be published, and when, as well as under what conditions associations may become a party to the procedure or seek judicial review of the decisions issued in such procedures.⁴⁰

48. The Party concerned states that, in the context of the present communication, the relevant subsequent procedures are the planning and building procedures under the Building Act, the procedure for the placement of a nuclear plant, the procedure on the construction of a nuclear plant and the procedure for granting the nuclear power plant operating permits pursuant to the 1997 Atomic Act. The Party concerned asserts that all of these procedures meet the definition of subsequent procedures as defined in the 2015 EIA Act and accordingly the 2015 EIA Act's provisions on public participation apply to all of them.⁴¹

49. By email of 21 October 2016, observer OEKOBUEO stated that a pending amendment of the 2015 EIA Act would exhaustively list subsequent procedures and that procedures under the 1997 Atomic Act were not on the list.⁴²

Article 6(8)

50. The communicant claims that the Party concerned is in breach of article 6(8) of the Convention by failing to ensure that in decision-making on nuclear power plants due account is taken of the outcome of the public participation. It contends that the public concerned is excluded from participation in the building permit procedure and thus cannot exercise its rights.⁴³ The communicant submits that, while anyone can participate during the EIA procedure, no final decision is issued by the assessing authority which reflects the comments or suggestions of the public.⁴⁴

51. The communicant also submits that comments are only dealt with in a formal, not substantive, manner. It claims that in the authorization of blocks 1 and 2 of Temelin NPP, the administrative authorities referred members of the public to subsequent procedures (in some of which they were not entitled to participate) and then subsequently stated during these procedures that these issues had already been considered at previous stages.⁴⁵ The communicant also alleges that, in the EIA procedure for blocks 3 and 4 of the Temelin NPP, the public's comments, including those of the communicant, were rejected very briefly by the Ministry of the Environment, the competent authority, and many of them were not dealt with at all. It claims that the Ministry of the Environment provided its opinion approving the project without considering those comments.⁴⁶ The communicant claims that the comments it submitted during the planning permit procedure and building permit procedure on a nuclear fuel storage facility for Temelin NPP were not dealt with either (see paras. 34-36 above).⁴⁷

52. The communicant claims that, during building permission procedures, administrative authorities often rely on section 114(2) of the Building Act (see para.

⁴⁰ Ibid., p. 5.

⁴¹ Ibid., p. 4.

⁴² Email received from observer OEKOBUEO, 21 November 2016.

⁴³ Communication, para. 22.

⁴⁴ Communicant's comments on the Party's response to the communication, 16 September 2015, p. 2.

⁴⁵ Revised summary of the communication, 16 December 2015, para. 11.

⁴⁶ Communicant's comments on the Party's response to the communication, 16 September 2015, pp. 2-3.

⁴⁷ Ibid., 16 September 2015, p. 3.

28 above) to reject the public's objections. It contends that neither the administrative authorities nor the courts interpret or apply section 114(2) in accordance with its true contextual meaning. It submits that objections should only be rejected when they were not properly raised in the course of the planning permit procedure, or where they were raised and properly dealt with and examined on the merits. It states that where an objection has not been examined on its merits in the planning permit procedure, it should not be rejected without remedy in the building permit procedure.⁴⁸

53. The communicant submits that, despite the strengthening of rights for the public concerned through the 2015 EIA Act, the risk remains that comments continue to be rejected for formal reasons. It also claims that, in violation of article 6(8), opinions or binding opinions relating to certain matters, such as the culling or interference with protected animals and plants, precede the EIA procedure, and thus competent authorities could simply reject comments on such questions on the grounds that these matters have already been decided.⁴⁹

54. Finally, the communicant claims that a proposed amendment to the Building Act would restrict the public's ability to "oversee compliance with the law and with the public interest in the protection of nature and landscapes"⁵⁰ in proceedings concerning projects not subject to the EIA Act and that such an amendment would not be in accordance with article 6(8).⁵¹

55. The Party concerned submits that, in the context of developments requiring an EIA procedure, everyone is given the opportunity to comment, both in writing and at public hearings, on all documents serving as the basis for the binding EIA statement and the settlement of the comments received is one of the mandatory requirements of the binding EIA statement under the 2015 EIA Act.⁵² It states that the 2015 EIA Act also provides that the comments received constitute the basis for the decision of the administrative authority in the subsequent procedures.⁵³

56. The Party concerned further submits that, with respect to subsequent procedures, the Convention's requirement to ensure that the outcome of the public participation is duly taken into account is fulfilled in two ways:

(a) Any member of the public has a right to submit comments on the project during the subsequent procedure. For example, with respect to planning permission procedures, the Building Act provides the possibility for the public to submit comments within a specified period and that one of the statutory requirements for the planning permit is the evaluation of the public's comments;⁵⁴

(b) Associations may receive the status of a *sui iuris* participant in the subsequent procedure. The only condition in that regard is that the association must register with the administrative authority managing the subsequent procedure within 30 days from the date of publication of the notice regarding the subsequent procedure.⁵⁵

⁴⁸ Communication, para. 28.

⁴⁹ Communicant's reply to the Committee's questions, 23 June 2017, paras. 12-13.

⁵⁰ *Ibid.*, para. 16.

⁵¹ *Ibid.*, para. 16.

⁵² Party's response to the communication, pp. 5-6.

⁵³ *Ibid.*, p. 6.

⁵⁴ *Ibid.*, pp. 6 and 12.

⁵⁵ *Ibid.*, pp. 6-7.

57. Finally, the Party concerned states that the draft amendments to the Building Act referred to by the communicant (see para. 54 above) had not yet been adopted.⁵⁶

Article 9(2)

58. The communicant submits that under section 65 of the Code of Administrative Justice, for a person to have legal standing to file a challenge, the person must either have a claim that its rights have been curtailed by an administrative authority's decision establishing, altering or abolishing rights or obligations, or a claim that its rights have been curtailed by an administrative authority's actions to such an extent that it could result in the adoption of an unlawful decision.⁵⁷ The communicant claims that in practice access to justice is, in most cases, restricted to persons that have already participated in the previous related administrative procedure in the matter.⁵⁸

59. The communicant refers to a 2007 judgment of the Supreme Administrative Court (judgment ref. no. 1 As 13/2007), which held that EIA opinions were not directly reviewable but could only be reviewed in an action concerning the subsequent approval procedure, typically the planning permit procedure.⁵⁹ The communicant stated that it nonetheless attempted to challenge an EIA opinion but was denied standing by the Supreme Administrative Court (see para. 36 above).⁶⁰ The communicant submits this exclusion of the possibility of direct review of the EIA opinion violates article 9(2).⁶¹

60. The communicant submits that under the Building Act, only members of the public whose title of ownership might be affected are entitled to challenge the decision before the courts.⁶² In that regard, the communicant also cites its own unsuccessful litigation in which it was denied standing because, as an unincorporated association, it could not be a participant in the building permit procedure, but only the planning permit procedure (see para. 35 above).⁶³ The communicant submits that the Supreme Administrative Court's resolution of 19 August 2014 (see para. 36 above) came too late, having been issued 6 years after the permit had been granted, when the storage facility had been finished in full and put into operation.⁶⁴

61. The communicant further claims that according to the courts' jurisprudence, associations may only seek review of procedural rights, not substantive rights, and this prevents them from alleging "factual (substantive) defects" in permit procedures.⁶⁵ The communicant refers in this regard to a 1998 decision by the Constitutional Court (decision ref. no. I. ÚS 282/87), in which the Court held that associations could not invoke the right to healthy environment since this right may

⁵⁶ Party's comments on the communicant's reply to the Committee's questions, 11 July 2017, p. 2.

⁵⁷ Communication, para. 20.

⁵⁸ Ibid.

⁵⁹ Communication, paras. 40-41.

⁶⁰ Communicant's comments on the Party's response to the communication, 16 September 2015, p. 5.

⁶¹ Communication, para. 42.

⁶² Ibid., para. 24.

⁶³ Communicant's comments on the Party's response to the communication, 16 September 2015, p. 4.

⁶⁴ Ibid.

⁶⁵ Communication, para. 27, and communicant's reply to the Committee's request for clarification, 18 September 2014, para. 11.

only be claimed by natural persons.⁶⁶ The communicant alleges that the courts in essence never consider the merits of associations' objections.⁶⁷ The communicant also submits that the courts reject the overwhelming majority of claims by associations against nuclear facilities, with the only exception being freedom of information disputes.⁶⁸ Finally, the communicant submits that, even after the 2015 EIA Act, courts have not changed the administrative practice of rejecting comments for formal reasons.⁶⁹

62. The Party concerned submits that article 9(2) is not "directly executable", citing the statements in *The Aarhus Convention: An Implementation Guide*⁷⁰ (Implementation Guide) that a Party has an obligation to ensure "a judicial or other independent and impartial review of substantive or procedural legality" and that "standing requirements [are to be] determined in accordance with national law and with the objective of wide access to justice."⁷¹

63. The Party concerned asserts that members of the public concerned, as defined in section 3(i)(2) of the 2015 EIA Act are permitted to challenge the substantive or procedural legality of decisions in subsequent procedures (see para. 30 above).⁷² It states that, while the binding EIA statement cannot be challenged separately, it is fully reviewable within an appeal against any decision for which it has served as a basis.⁷³ The Party concerned further states that the public concerned also has the right to challenge a decision not to conduct an EIA procedure for a project.⁷⁴

64. The Party concerned submits that the 1998 decision by the Constitutional Court cited by the communicant is no longer applicable. It claims that, in decisions ref. no. I. ÚS 59/14 and IV. ÚS 3572/14, the Constitutional Court overturned decision ref. I. ÚS 282/87 and held that associations can indeed invoke a right to a healthy environment.⁷⁵

Article 9(3)

65. The communicant claims that, based on its many years of experience, it is convinced that the national law of the Party concerned does not comply with article 9(3) of the Convention. The communicant claims that the Party concerned systematically and consistently prevents members of the public concerned from access to court review of the most significant administrative procedures through which decisions are adopted on crucial issues of approval for the commissioning of nuclear facilities or the construction of storage of spent nuclear fuel. The

⁶⁶ Communication, paras. 26 and 34, and communicant's reply to the Committee's request for clarification, 18 September 2014, para. 11.

⁶⁷ Communication, para. 34, and communicant's reply to the Committee's request for clarification, 18 September 2014, para. 11.

⁶⁸ Communication, para. 33.

⁶⁹ Communicant's reply to questions of the Committee, 23 June 2017, para. 13.

⁷⁰ United Nations publication, Sales No. E.13.II.E.3, p. 190.

⁷¹ Party's response to the communication, pp. 13-14.

⁷² Ibid., p. 15, and Party's comments on the communicant's reply to the Committee's questions, 11 July 2017, p. 1.

⁷³ Party's comments on the communicant's reply to the Committee's questions, 11 July 2017, p. 2.

⁷⁴ Party's response to the communication, p. 15

⁷⁵ Party's comments on Committee's draft findings, 9 October 2019.

communicant refers in this context also to its allegations regarding the restriction on claims concerning “factual (substantive) defects” (see para. 61 above).⁷⁶

66. The communicant claims that the proposed amendment to the Building Act (see para. 54 above) would also not be in accordance with article 9(3).⁷⁷

67. The Party concerned submits that, for the same reasons as article 9(2) (see para. 62 above), article 9(3) is not “directly executable”.⁷⁸ It refers in this context also to the judgment of *Lesoochranárske zoskupenie*,⁷⁹ in which the Court of Justice of the European Union ruled that article 9(3) does not contain any clear and precise obligation giving rise to direct effect, and to a decision of its own Supreme Administrative Court of 18 April 2014.⁸⁰

68. The Party concerned states that access to justice regarding projects which are not assessed pursuant to the 2015 EIA Act (as well as for entities not covered by section 3(i)(2) of the 2015 EIA Act) is governed by section 65 of the Code of Administrative Justice (see para. 29 above).⁸¹

69. The Party concerned asserts that an application for judicial review under section 65 of the Code of Administrative Justice may be brought either by entities that were a party to the procedure or by those who were not a party to the procedure but whose rights were reduced or affected by the decision issued. According to the Party concerned, this will usually involve legal or natural persons who were parties to the administrative procedures in which the challenged decision had been made, but this is not a condition.⁸²

70. The Party concerned states that the proposed amendment to the Building Act referred to by the communicant (see para. 66 above) had not yet been adopted.⁸³

Article 9(4)

71. The communicant submits that the law of the Party concerned is in conflict with article 9(4) of the Convention because court proceedings take a long time, frequently lasting for more than 1 or 2 years before a court even orders a trial.⁸⁴ The communicant points out that there are no statutory deadlines within which courts must decide a case.⁸⁵

72. The communicant further observes that filing an action against a decision adopted by the administrative authorities does not have suspensive effect under section 73 of the Administrative Procedure Code.⁸⁶ The communicant submits that the administrative courts may grant suspensive effect to an action upon the plaintiff's motion but this rarely happens in practice. It claims that for this reason cases are usually only decided after the construction of the facility in question has been fully

⁷⁶ Communication, para. 35.

⁷⁷ Communicant's reply to the Committee's questions, 23 June 2017, para. 16.

⁷⁸ Party's response to the communication, p. 14.

⁷⁹ Case C-240/09, *Lesoochranárske zoskupenie* (2011) ECR I-125.

⁸⁰ Party's response to the communication, pp. 14 and 16-17.

⁸¹ *Ibid.*, p. 15.

⁸² *Ibid.*, p. 16-17.

⁸³ Party's comments on the communicant's reply to the Committee's questions, 11 July 2017, p. 2.

⁸⁴ Communicant's comments on the Party's response to the communication, 16 September 2015, p. 5.

⁸⁵ Communication, para. 36.

⁸⁶ *Ibid.*

completed (substantial investments were made etc.) or after the facility has been commissioned and is in operation.⁸⁷ The communicant refers in that regard to its challenge of the planning permission for a nuclear storage facility, in the context of which the Municipal Court of Prague denied the communicant's application for suspensive effect and the building permit was issued (see para. 34 above).⁸⁸

73. Finally, the communicant submits that it remains unclear, following the adoption of the 2015 EIA Act, whether suspensive effect will be granted to planning permits, and not only to building permits, and that 90 days may be an insufficient time to decide on whether suspensive effect should be granted.⁸⁹

74. The Party concerned submits that the wording of article 9(4) makes it clear that the Convention provides Parties with a certain degree of discretion regarding arrangements for injunctive relief, its forms and conditions for its award.⁹⁰ It argues that the Convention does not require injunctive relief to be granted automatically regardless of the circumstances, but rather injunctive relief should be granted under such conditions that permit the avoidance of irreversible damage to the environment.⁹¹

75. The Party concerned states that the Code of Administrative Justice provides two instruments that are predominantly used for this purpose: the preliminary injunction and suspensive effect. It explains that through 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, while the award of suspensive effect withholds the effects of the contested decision until its review by a court.⁹²

76. The Party concerned states that under its legal system a legal action against an administrative decision does not automatically have a suspensive effect and it rather is awarded in individual cases depending on the circumstances.⁹³ With respect to the requirements for the grant of suspensive effect set out in the Code of Administrative Justice, including that its grant not be contrary to the public interest (see para. 33 above), the Party concerned claims that the public interest would doubtlessly also include the interest in protecting the environment.⁹⁴

77. The Party concerned states that the conditions for suspensive effect are defined differently under the 2015 EIA Act. Specifically, if a legal action is brought against a decision issued in subsequent procedures, the court shall always make a decision on whether to grant suspensive effect and shall grant it if there is a risk that the implementation of the project may cause serious damage to the environment.⁹⁵ The Party concerned states that 2015 EIA Act also provides the court with the option to award suspensive effect or a preliminary injunction (see para. 32 above).⁹⁶

78. The Party concerned submits that, in light of the foregoing, the objective of article 9(4) of the Convention is fulfilled as the courts have the possibility to award

⁸⁷ Ibid., paras. 36-38.

⁸⁸ Communicant's comments on the Party's response to the communication, 16 September 2015, p. 3

⁸⁹ Communicant's replies to the Committee's questions, 23 June 2017, para. 14.

⁹⁰ Party's response to the communication, p. 18.

⁹¹ Ibid., p. 19.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid., pp. 19-20.

⁹⁵ Ibid., p. 20.

⁹⁶ Ibid.

suspensive effect against the decision and the decision may not then be executed until it is reviewed for substantive and procedural legality.⁹⁷

III. Consideration and evaluation by the Committee

79. Czechia deposited its instrument of accession on 6 July 2004. The Convention entered into force for Czechia on 4 October 2004.

Admissibility

80. The communicant's allegations are largely of a systemic nature. With respect to those aspects of its communication that concern the decision-making on blocks 3 and 4 of the Temelin nuclear power plant, the communicant claims that all domestic remedies have been exhausted (see paras. 38-39 above).

81. The Party concerned does not challenge the communication's admissibility.

82. The Committee finds the communication to be admissible.

Scope of consideration

83. The communication was submitted in 2013, before the EIA Act was amended in 2015. Subsequent to the entry into force of the 2015 EIA Act, the Committee asked the communicant whether any of its allegations had thereby been resolved.⁹⁸ The communicant indicated that it considered that its allegations remained applicable in their entirety.⁹⁹ The Committee therefore examines the allegations made by the communicant in its communication of 26 November 2013 in the light of the 2015 EIA Act.

84. The Committee finds that, contrary to the view of the communicant,¹⁰⁰ a number of the communicant's allegations are the same or not substantively different from those examined by the Committee in its findings on communication ACCC/2010/50. Those findings were endorsed by the Meeting of the Parties at its fifth session through decision V/9f on the compliance of the Party concerned.¹⁰¹ In the light of the Committee's report to the sixth session of the Meeting of the Parties on the implementation on decision V/9f, the Meeting of the Parties at its sixth session adopted decision VI/8e¹⁰² with respect to the remaining points of non-compliance by the Party concerned identified in the Committee's report. Through its follow-up on decision VI/8e, the Committee is examining the measures taken by the Party concerned to address the outstanding points of non-compliance found by the Committee in its findings on communication ACCC/C/2010/50. The Committee will accordingly examine any further information received from the communicant regarding those points in the context of its follow-up on decision VI/8e.

85. The Committee notes that the communicant's allegations concerning the public participation procedures on blocks 1 and 2 of the Temelin nuclear power plant

⁹⁷ Ibid., pp. 20-21.

⁹⁸ Questions from the Committee to the communicant, 8 June 2017.

⁹⁹ Communicant's reply to the Committee's questions, 23 June 2017, para. 17.

¹⁰⁰ Communicant's revised summary of the communication, 16 December 2016, para. 20.

¹⁰¹ ECE/MP.PP/2014/2/Add.1.

¹⁰² ECE/MP.PP/2017/2/Add.1.

(see para. 51 above) predate the entry into force of the Convention for the Party concerned. The Committee will thus not consider these allegations further.

86. The Committee recalls that it examined various aspects of the public participation procedure concerning the EIA procedure on blocks 3 and 4 of the Temelin nuclear power plant in its findings on communication ACCC/C/2012/71 (Czechia),¹⁰³ which were endorsed by the Meeting of the Parties at its sixth session through decision VI/8e. The facts at issue in the present case pre-date those findings. Accordingly, the findings in this case have no bearing on the Committee's findings and recommendations on communication ACCC/C/2012/71, or decision VI/8e of the Meeting of the Parties, through which those findings were endorsed.

87. In line with its practice, in the context of the present findings the Committee will not examine the compliance with the Convention of legislative drafts not yet adopted, such as the draft amendment to the Building Act referred to by the communicant or the draft amendment to the 2015 EIA Act referred to by the observer OEKOBUERO (see paras. 49, 54 and 66 above).

88. Finally, the Committee makes clear that, as for all its findings, a finding in the present case that the Party concerned is not in non-compliance with respect to a particular matter, does not prevent the Committee from examining a further allegation concerning that matter if raised in a future case and sufficiently substantiated by relevant evidence.

Article 6 (1)

89. It is common ground between the parties that the construction of a nuclear power plant, being an activity listed in Annex I to the Convention, requires an EIA under national law and that the provisions of article 6 apply not only to the EIA procedure but also to subsequent procedures, such as the planning and building permit procedures (see paras. 42 and 43 above).

90. According to section 9(c) of the 2015 EIA Act, subsequent procedures, as defined in section 3(g) of that Act, require public participation. In this regard, the Party concerned states that the regulation in sections 9(b)-(e) of the 2015 EIA Act of public participation in subsequent procedures takes precedence over the regulation of public participation in the legislation under which these procedures are conducted (see para. 47 above).

91. The Committee takes note of the statement of the Party concerned that in the permitting of nuclear power plants both the planning permit and building permit procedures under the Building Act and under the Atomic Act (procedures for the placement of a nuclear plant, on the construction of a nuclear plant and for granting the nuclear power plant operating permits) are to be considered subsequent procedures for the purpose of the 2015 EIA Act (see para. 48 above). It also notes the claim by observer OEKOBUERO that a pending amendment of the 2015 EIA Act would exhaustively list subsequent procedures and that procedures under the 1997 Atomic Act are not on the list.¹⁰⁴ However, since the Committee is already examining the issue of whether procedures under the Atomic Act are treated as subsequent procedures for the purposes of the 2015 EIA Act in the context of its review of decision VI/8e¹⁰⁵ it does not examine this issue further in the present case.

¹⁰³ ECE/MP.PP/C.1/2017/3.

¹⁰⁴ Email received from observer OEKOBUERO, 21 November 2016.

¹⁰⁵ See Committee's first progress review on decision VI/8e, 25 February 2019, paras. 27 and 29.

92. The communicant alleges that there are restrictions on the possibilities for the public to participate in practice. In this regard, the communicant cites particular provisions of the Building Act and Atomic Act and decisions given by the courts of the Party concerned which it alleges have restricted public participation (see paras. 44, 50, 52, 59-61 above). However, the cases presented by the communicant refer to the legal situation before the adoption of the 2015 EIA Act and the communicant has provided no evidence that the alleged restrictions have continued since that 2015 EIA Act's enactment. The Committee thus finds that the communicant's allegations on this point are not substantiated.

Article 6(3)

93. Since the Committee has already considered the communicant's allegations concerning article 6(3) in its consideration with respect to article 6(1) in paragraphs 89 to 92 above, it does not consider those allegations again here.

Article 6(8)

94. With respect to ensuring that the legal framework of the Party concerned establishes a clear requirement to take due account of the outcome of public participation, the Committee considers that in the context of the EIA procedure this requirement is met through annexes 5 and 6 of the 2015 EIA Act, which state that the EIA statement must include a "settlement" of the comments received on the notification and on the expert report (see para. 23 above).

95. As regards the subsequent procedures, the Committee considers that the Party concerned meets the requirement to take due account of the outcome of public participation by section 9(c)(2) of the 2015 EIA Act, which requires the administrative authority "to refer to the settlement of the comments from the public in the grounds of its decision" (see para. 22 above).

96. Concerning the communicant's allegation that administrative authorities during the building permit procedure often rely on section 114(2) of the Building Act to reject the public's objections (see para. 52 above), the Party concerned has stated that the public participation requirements in the 2015 EIA Act take precedence over those set out in a special regulation, such as the Building Act (see para. 47 above), and the communicant has not presented any evidence to the contrary. In particular, the communicant has not provided any evidence that, since the 2015 amendment to the EIA Act, section 114(2) of the Building Act has been applied to prevent comments that could have been raised in the planning procedure from being accepted.

97. The communicant submits that the risk remains that comments continue to be rejected for formal reasons despite the 2015 EIA Act (see para. 53 above). The Committee emphasizes that a system whereby only the comments of certain members of the public are duly taken into account, while others are disregarded or considered to "count less" by the decision-making authorities, would not be consistent with the Convention.¹⁰⁶ However, while not precluding the possibility to examine this point further should relevant evidence be put before it in a future case, the Committee cannot conclude in the abstract that the system instituted by the Party concerned through the 2015 EIA Act will lead to such a result.

98. The communicant queries whether procedures for early use and test operation or occupancy consent will be treated as subsequent procedures for the purposes of the

¹⁰⁶ ECE/MP.PP.2017/38, para. 37.

2015 EIA Act.¹⁰⁷ According to the communicant there is also a risk that competent authorities might simply reject comments on opinions that precede the EIA procedure, such as those on the culling or interference with protected animals and plants, on the grounds that these matters have already been decided.¹⁰⁸ Again, while not precluding the possibility to examine these points further should relevant evidence be put before it in a future case, lacking any evidence of how these issues are being dealt with in practice, the Committee cannot examine these points in the abstract.

99. The communicant alleges that the Party concerned failed to take due account of the comments received from the public during the EIA procedure on blocks 3 and 4 of the Temelin NPP and during the planning permit and building permit procedures for a nuclear storage facility at the plant (see para. 51 above), but the communicant has not provided any evidence to support these allegations.

100. Based on the considerations in paragraphs 94-99 above, the Committee finds that the communicant has not substantiated its allegations that the Party concerned fails to comply with article 6(8) of the Convention in the context of the present case.

Article 9(2)

101. The communicant makes five allegations under article 9(2). Firstly, it alleges that the lack of possibility for members of the public to directly challenge the EIA opinion violates article 9(2). In this regard, the Party concerned states that, while it is not immediately possible to challenge the binding EIA statement itself, the EIA statement is fully reviewable within an appeal against any subsequent decision for which it has served as a basis (see para. 63 above). The Committee considers that there is nothing in the Convention to prevent Parties from establishing such a system as long as all relevant claims can still be brought when challenging the subsequent decision and that adequate, effective and timely remedies are available at that time, including that injunctive relief is provided where appropriate. The communicant has provided no evidence that would put into question the efficacy of the system currently in place.

102. In this regard, the opinions and practice concerning nuclear energy projects to which the communicant refers, including Temelin, all predate the 2015 EIA Act. Since the communicant has not provided any evidence that these opinions and practice continue to apply after the 2015 Act, the Committee will not consider these allegations further in the context of the present case.

103. Secondly, the communicant alleges that section 65 of the Code of Administrative Justice limits legal standing to challenge a decision to persons whose rights have been affected. However, the Committee understands that, pursuant to section 9(d)(1) of the 2015 EIA Act, the public concerned referred to in section 3(i)(2) of the EIA Act is entitled to bring a legal action against a decision issued in a subsequent procedure to protect the public interest and to challenge the substantive or procedural legality of that decision (see para. 30 above). Moreover, section 9(c)(4) of the 2015 EIA Act makes clear that this includes the public concerned even if not a party to the administrative procedure (see para. 30-31 above).

104. Thirdly, the communicant alleges that only members of the public whose title of ownership may be affected are entitled to challenge decisions under the Building Act. On this point, the Party concerned states that the granting of a building permit is a subsequent decision (see para. 48 above). In the absence of any evidence to the

¹⁰⁷ Communicant's reply to the Committee's questions, 23 June 2017, para. 11.

¹⁰⁸ Ibid., paras. 12-13.

contrary, the Committee understands that, pursuant to section 9(d)(1) of the 2015 EIA Act, the public concerned referred to in section 3(i)(2) of the EIA Act is entitled to bring a legal action to challenge the substantive or procedural legality of a decision to grant the building permit.

105. Fourthly, the communicant claims that, according to the caselaw of the courts, associations cannot invoke substantive rights relating to the environment but only procedural rights and that this prevents them from alleging “factual (substantive)” defects in permitting procedures. However, pursuant to section 9(d)(1) of the 2015 EIA Act, the public concerned is entitled to bring a legal action to challenge the “substantive or procedural legality” of a decision issued in a subsequent procedure. Since the communicant has not provided any examples of court decisions issued after the entry into force of the 2015 EIA Act in which the public concerned have been denied the possibility to challenge a substantive defect in a permitting procedure within the scope of article 6 of the Convention, the Committee finds the communicant’s allegation to be unsubstantiated.

106. Finally, the communicant claims that associations cannot invoke the right to a healthy environment, but that only natural persons have standing to do so, referring in this regard to a 1998 judgment of the Constitutional Court. The Committee notes that the judgment cited by the communicant was decided prior to the entry into force of the Convention and before the Party concerned became a Party thereto. The communicant has not provided any court decisions issued since the Convention entered into force for the Party concerned that would demonstrate that the ruling of the Constitutional Court continues to apply and if it indeed does so, how it has prevented members of the public from obtaining access to justice under article 9(2) of the Convention.

107. In light of the above, the Committee finds that the communicant has not substantiated its allegations that the Party concerned fails to comply with article 9(2) of the Convention in the context of this case.

Article 9(3)

108. The communicant’s allegations regarding article 9(3) concern the possibility for members of the public to challenge permitting decisions for activities subject to article 6 of the Convention, such as nuclear-related activities. The Committee points out that the rights of the public to have access to justice in such cases is primarily addressed in article 9(2) of the Convention. However, in this case nothing turns on this point as the communicant has failed to provide any information that would be additional to its submissions already considered by the Committee under article 9(2) of the Convention above. In particular, the communicant has not identified any provisions of national law relating to the environment which it claims were contravened but could not be challenged through administrative or judicial procedures.

109. In the light of the above, the Committee finds that the communicant has not substantiated its allegations that the Party concerned fails to comply with article 9(3) of the Convention in the context of this case.

Article 9(4)

110. The communicant makes three allegations under article 9(4) of the Convention. First, that the Party concerned fails to ensure timely judicial procedures and that the procedural rules of the Party concerned do not set statutory deadlines for the courts to decide a case (see para. 71 above). Second, that court proceedings against a decision adopted by an administrative authority do not have automatic suspensive effect. Third,

even if applied for, courts rarely grant suspensive effect in practice (see para. 72 above).

111. With respect to the first allegation, article 9(4) requires that the procedures covered by article 9 be timely. It does not however necessarily require Parties to set out in law specific timeframes within which the courts must decide cases. Thus, the Committee does not find the Party concerned to be in non-compliance with article 9(4) for failing to set statutory deadlines within which the courts must decide a case.

112. Regarding the communicator's allegation that it often takes 1-2 years before a court schedules a hearing in an administrative proceeding, the Committee considers that in order for the Committee to examine a systemic allegation of this nature, the communicator would have needed to support its allegation with clear evidence, including of the usual duration of court proceedings within the scope of article 9 of the Convention in the Party concerned. Since the communicator has not done so, the Committee finds the alleged non-compliance to be unsubstantiated in this case.

113. Concerning the communicator's allegation that the Party concerned fails to comply with article 9(4) because filing court proceedings against a decision of an administrative authority does not have automatic suspensive effect, the Committee does not consider that automatic suspensive effect is necessarily required to comply with article 9(4) of the Convention, although it can be a very useful mechanism through which to prevent environmental damage. The Committee thus does not find the lack of automatic suspensive effect as such to amount to non-compliance with article 9(4) of the Convention.

114. With respect to the grant of suspensive effect at the applicant's request, the Committee observes that the legal situation described in the communication has changed following the 2015 amendment to the EIA Act. Under section 9(d)(2) of the 2015 EIA Act, in the context of a claim concerning a decision in subsequent procedures the courts shall grant suspensive effect or a preliminary injunction, even without a request by the applicant, if there is a danger of serious environmental damage (see para. 32 above). According to the same provision, the courts shall issue their decision within 90 days.

115. The communicator claims that it remains unclear whether suspensive effect will be granted to planning, and not just building, permits and that a time limit of 90 days may be too short for courts to decide on whether suspensive effect should be granted (see para. 73 above). The Committee emphasizes that, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm (see ACCC/C/2012/76 (Bulgaria)),¹⁰⁹ it is of crucial importance that injunctive relief is granted whenever there is a risk of environmental damage and that situations in which development consent is granted prior to the completion of judicial proceedings related to the project should be prevented. However, the communicator has not put evidence before the Committee that the courts of the Party concerned are applying the provisions of the 2015 EIA Act in a manner that denies injunctive relief in cases where the execution of the challenged planning permit may cause environmental damage. The Committee accordingly finds the communication's allegations on this point to be unsubstantiated.

116. In light of the foregoing, the Committee finds that the communicator has not substantiated its allegations that the Party concerned fails to comply with article 9(4) of the Convention in the circumstances of this case.

¹⁰⁹ ECE/MP.PP/C.1/2016/3, para. 77.

IV. Conclusion

117. Based on the above considerations, the Committee does not find the Party concerned to be in non-compliance with article 6 or 9 of the Convention in the circumstances of this case.

118. The Committee makes clear that its findings on the present communication have no bearing on its findings and recommendations on communication ACCC/C/2012/71 and its review of the implementation of decision VI/8e of the Meeting of the Parties concerning the Party concerned.

Advance unedited