



# Public participation undesirable

Shadow Report on the Implementation of the Aarhus Convention  
Czech Republic 2017

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**Czech Republic  
2017**



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ISBN: 978-80-87651-37-7

For more information:  
<http://arnika.org/en>

*This report was prepared by the non-governmental organizations as their contribution to the Sixth Meeting of the Parties to the Aarhus Convention (Montenegro, 2017).*

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## Index of abbreviations

NGO	Non-profit non-governmental organizations
EIA	Environmental Impact Assessment
SEA	Strategic Environmental Assessment
CENIA	Czech Environmental Information Agency

# Introduction

The Czech Republic has signed the Aarhus Convention on 25 June 1998 and ratified it on 6 June 2004. The Aarhus Convention has been published in the collection of international treaties under No. 124/2004.

In response to the access to the Aarhus Convention, the Czech Republic adopted a new adjustment of public access to environmental information. Participation of the public in the form of non-governmental organizations (“NGOS”) to all the proceedings relating to the environmental protection has been enshrined in the Nature and Landscape Protection Act already since 1992. Participation of the public – natural persons – was mainly regulated by the Building Act and limited to the owners affected by the development. Access to the courts has traditionally been limited to parties to the proceedings. This legislation was inadequate, because although all associations could participate the proceedings, they has not been granted the right to a favorable environment and could thus claim only the interference with their procedural rights in the proceedings before the courts, and the courts therefore reviewed the decisions only on the procedural side. Although natural persons could claim the interference in both procedural and substantive rights, and the courts conducted a full review, only property owners had the right to take part in the proceedings and suing, but not their tenants. This situation continued since the adoption of the Aarhus Convention by 2015.

Major changes to the above-mentioned adjustment has taken place after 2015. In response to criticism by the Aarhus Convention Compliance Committee and the European Union, an amendment to the Environmental Impact Assessment Act, which dealt with the part of the deficiencies described above (in particular also granted the NGOs the right to request judicial review of the substantive legality of the decision), was adopted in the year 2015. In 2017, an amendment to the Building Act was adopted, which fundamentally weakened the public participation in proceedings, except for the few exceptions that excluded the participation of associations<sup>1</sup> in proceedings concerning environmental issues, but relevant plans do not reach such intensities that they are subject to assessment of environmental impacts in the EIA procedure.

This report on the Aarhus Convention Implementation describes the condition outlined above in more detail.

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<sup>1</sup> The Association in the Czech Republic is the most common form non-governmental non-profit organizations in the area of environmental protection. Formerly, the associations were called by the designation of a civic association.

# Amendment to the Building Act of 2017

The amendment to the Building Act (Act No. 225/2017) will become effective 1.

1. 2018. The most significant changes relate to:

## 1. Changing the radius of parties to the proceedings – the exclusion of associations

New associations cannot participate in the territorial and construction proceedings under the Paragraph 70 of the Nature and Landscape Protection Act, unless the purpose was not assessed in the EIA procedure.

## 2. Shortening the deadline for contesting the zoning plan

The deadline for the possibility of judicially contesting the measures of a general nature will be **shortened** from the current **3 years to one year**. For example zoning plans are issued in the form of the measures of a general nature.

## 3. Zoning and building proceedings – simplified procedures and common proceedings

The main objective of the amendment was to simplify permitting processes in the area of land-use planning and building law, thus contributing to **the acceleration of construction in the Czech Republic**. For this reason, the range of the purposes for which you can use the simplified procedures for the construction of housing and family recreation, regardless of their surface area, is spreading. Furthermore, the Act allows **merging of the individual permitting processes into one proceeding**. Newly, there will be 3 new integrated procedures:

- zoning proceeding connected with assessment of the environmental impacts;
- common zoning and building proceedings;
- common zoning and building proceedings connected to EIA.

The existence of these integrated practices, however, unfortunately, does not change the obligations to obtain binding EIA opinions. The process of environmental impact assessment must be carried out in accordance with the rules laid down by law.

## 4. Transfer of powers to special building authorities

There will be a transition to the so-called special building authorities in the cases of the common land-use and construction proceedings.

## 5. The change in the assessment of compliance with the zoning plan

Compliance of the zoning plan with the tasks and objectives of the land-use planning will be newly assessed by the Land-use Planning Authority. At present, the building authority, which conducts the land-use proceeding, does so.

## 6. Binding opinions of the bodies concerned

The newly, binding opinion, which is issued as a basis for proceedings pursuant to the Building Act (for example, the opinion of the authority of nature and landscape protection, air, or water), may be **repealed or amended only** in the appeal proceedings against **the resulting decision**. In practice, it will look like that if a building receives a dissenting opinion from one of the authorities concerned, it will first have to reject its **application by**

**the building authority** and then against the negative decision by filing an appeal. In the current state, it is also possible to cancel the position in the context of the review procedure, which occurs independently of the administrative decision procedure.

The amendment to the Building Act thus restricts public access to judicial protection in many respects. This is mainly the case of the above-mentioned exclusion of associations from territorial and construction proceedings.



***A slightly better building.*** In 2010, the citizens of Jihlava managed to influence the construction of the City Park shopping center, standing in the neighborhood of the medieval city walls and the historical core. Thanks to the activity of the people, the department store is lower, has green facades, the investor has modified the public space, planted trees and set up a cycle path. Under the new legislation, people could not take part in the proceedings.

*Photo: Jan Losenický/Arnika*

## **I. Access to information**

The right of access to environmental information is one of the three pillars of the Aarhus Convention. By signing the Convention, Member States have committed themselves to ensuring that everyone has access to information related to the state of the environment and its impact on human health. This information is typically published by public authorities, either through the active measures of these authorities or at the request of the public.

The Aarhus Convention emphasizes that the required information should be provided in a comprehensible manner and that modern technology should be used in its processing and publication. In addition to publishing important data in standard printed form, the authorities also publish information via the Internet or mobile applications.

## Good practice: Mobile applications concerning the state of the environment

All documents from the EIA and SEA process are publicly available online on the CENIA (the Czech Environmental Information Agency) website, organization belonging to the Ministry of Environment.

[https://portal.cenia.cz/eiasea/view/eia100\\_cr](https://portal.cenia.cz/eiasea/view/eia100_cr)

One of the new progressive tools is the **Senoseč** mobile application, which specializes in the protection of animals during harvesting and gathering, run by the Ministry of the Environment. If citizens suffer from the large animal deaths during annual harvests, they can register with volunteers using the application and report the occurrence of live and dead animals by farms, farm workers and hunters.

[https://www.mzp.cz/cz/news\\_161027\\_Senosec\\_sezona\\_2016](https://www.mzp.cz/cz/news_161027_Senosec_sezona_2016)

If citizens are interested in environmental protection, but are not sure how to interpret individual legal provisions, they can install the **Georeport** application, also run by the Ministry of the Environment, which is able to interpret legal information about a particular location the user chooses.

[https://geoportal.gov.cz/web/guest/about\\_georeports](https://geoportal.gov.cz/web/guest/about_georeports)

## The Constitution and the laws

Access to environmental information is a prerequisite for qualified public participation in its protection; the right to information on the environment is guaranteed by **Article 35, Paragraph 2 of the Charter of Fundamental Rights and Freedoms**, which establishes the right of everyone to timely and complete information on the state of the environment and natural resources. However, access to this right is limited and can be claimed only within the limits of the law. Specifically, **Act 123/1998 Coll., on the Right to Information on the Environment**.

In addition to the Act on the Right to Information on the Environment, the right to information is also regulated in **Act No. 106/1999 Coll., On Free Access to Information**, dealing with general regulation of access to information.

## Amendments

Both of these laws have been amended in recent years. The first, the **act on the right to information on the environment**, was amended in 2015. The amendment significantly extended the concept of “information on the state of the environment and natural resources” through data managed by the Ministry of the Environment via the Geoportal web server and supported electronic access to information.

The latter, **the law on free access to information** was amended twice, in 2015 and 2016. The 2015 amendment, which was a response to the directive of

the European Parliament and the Council, introduced amendments of a mainly technical nature, followed by changes relevant to the commercial sphere. The 2016 amendments mainly concerned the promotion of electronic access to information.

In this law, the possibility of charging for the information provided remains unfortunate, confirmed in 2011 by the **Supreme Administrative Court**. Thus, administrative authorities may request reimbursement for the information provided when they make copies, provide technical data carriers, send information to the applicant, or seek extraordinarily extensive information (not related to environmental information).

In 2015, the **National Information System for the Collection and Evaluation of Environmental Pollution Information** project was completed, the implementation of which began in 2009. The objective of this project was to increase the transparency, consistency and effectiveness of the relations between public administration and the public with the Ministry of the Environment.

<http://www1.cenia.cz/www/projekt/cisazp>

This project was created by the information system, which consists of the following information systems:

- Integrated system of information obligations – ispop.cz
- Environmental helpdesk – helpdesk.cenia.cz
- GeoPortal – geoportal.gov.cz

The outputs of the project allow for the electronicization of the Ministry of the Environment's agendas and simplify the reporting duties and the performance of state administration.

## What is environmental information?

The concept of environmental information is very wide, and the act on the right to information on the environment only lists the data that can be dealt with. It should be noted that this list is not complete and other data may fall under the notion of **environmental information**. As a general rule, however, it is the following:

- status and development of the environment, causes and consequences of this state,
- state of the components of the environment, including genetically modified organisms, and the interaction between them, substances, energy, noise, radiation, waste,
- sources of information about the state of the environment and natural resources,
- reports on the implementation and the fulfillment of legislation in the field of environmental protection,
- international commitments related to the environment.

## Active disclosure of information

Active access to information means an active approach by public administration authorities when publishing data on the state of the environment. Therefore, the public does not have to request information in any way and the authorities makes it available themselves. Typically, these are published in printed publications, on websites, or in mobile applications.

Information that is actively published is, for example, state concepts and environmental policies, environmental statements prepared by the Ministry of the Environment, environmental risks assessment, or environmental information on international environmental treaties.

The state administration and self-government authorities are required by law to run information websites and take care of their updating. The public can find the necessary information in a number of electronic databases.

### Electronic database that monitors the state of the environment

The most important electronic databases relating to environmental information include servers:

- **Geoportal** – <https://geoportal.gov.cz/web/guest/home>  
This multi-purpose web portal provides information on protected areas, habitats and biotopes, energy sources and air conditions. The database enables individual data to be searched directly in a map of the Czech Republic.
- **Integrated Reporting Compliance System (IRCS)** – <https://www.ispop.cz/magnoliaPublic/cenia-project/uvod.html>  
IRCS enables the processing and receipt of selected environmental reports in electronic form and their further distribution to relevant public administration institutions.
- **Waste Management Information System (WMIS)** – <https://isoh.mzp.cz>  
WMIS is a comprehensive electronic information system serving the needs of waste management control in the Czech Republic.
- **Integrated Pollution Register (IPR)** – <https://www.irz.cz>  
The IPR collects and publishes a database containing pollutant release and transfer from industrial and agricultural operations according to the PRTR Protocol to the Aarhus Convention and relevant EU directives.
- **EIA Information System** – [https://portal.cenia.cz/eiasea/view/eia100\\_cr](https://portal.cenia.cz/eiasea/view/eia100_cr)  
This database gathers information on plans about the conclusions to environmental impact assessments, underlimit conclusions, as well as relevant European sites of interest and bird areas included in the Natura 2000 system.

In addition, the government of the Czech Republic annually prepares and approves a report on the state of the Czech Republic's environment, which must be published within 3 months of its approval.

News from July 2017 is also the **electronic newsletter of the Ministry of the Environment**. The first issue of the newsletter summarizes environmental news and

offers interviews with interesting personalities involved in the field of environmental protection.

## The provision of information upon request

In addition to the active disclosure of information, the mandatory authorities also provide information on the state of the environment on request. In such a case, the public is the active person asking the public administration authority for information.

**The public** can apply for the required information in practically any technical form. The only requirement that the law has in relation to an applicant for information is to make it clear what information the subject requires. At the same time, the applicant may choose the form in which the information is required and the public administration authority should comply with the request. If it does not comply with the form to the applicant, it is necessary to justify its procedure.

At the moment when the request is made to the public administration authority, the authority has 30 days to provide an answer. It may also happen that the request is incomprehensible or misleading for the public administration authority. In this case, the authority must notify the applicant and give them the following procedure. In addition, there are also **reasons** why the authority **may not** provide the requested information. These include the protection of business secrets, the protection of public safety, the defense of the state and the protection of international relations.

In each individual case (application), the **public interest served** by the disclosure of the information must be considered against non-disclosure interests.

The disclosure of information is not an administrative decision, but only the factual provision of information to the applicant, which implies that the positive processing of the request occurs outside the administrative procedure. In practice, this means that the administrative authority does not have to issue any administrative decision on the positive addressing of a request. On the contrary, if the statutory authority **rejects** an application, it is necessary to **issue an administrative decision** against which the applicant may appeal.

**Research of Masaryk University** students in 2013–2017 was devoted to the issue of providing information on request.

The research shows that the **scope and quality of responses vary according to the area** covered by the application and also the **type of authority** being asked. In practice, this means that the municipal and regional authorities respond differently. Similarly, if the question relates to the theme of land-use planning, citizens can obtain a more comprehensive answer than if they inquire about waste management information for example.

The best-processed theme according to research is **land-use planning**, which most of the requested municipalities process at high quality, and thus authorities do not have a problem providing the information.

The theme of land-use planning was best conducted by **regional authorities**. They were able to provide complete information according to the request in **85.7%** of cases. In other areas unfortunately, the regional authorities do not provide so much information.

**Statutory cities** provided complete land-use planning information in 65% of cases, 27% of which there were partial answers. In two cases, the office only provided a link and once **requested a fee**.

Another theme on which the authorities gave information quite willingly was the **theme on the participation of associations in territorial proceedings**; the worst of all was **requests for information on the felling and planting of greenery**.

From the total data collected, it resulted that the fees for providing information were rather exceptionally requested by the authorities.

The research shows that, notwithstanding the provisions of the act on free access to information, the authorities are in many cases are unwilling or unable to provide the requested information. For most themes, the success rate of obtaining complete information was around **half**, which raises a question mark over the equal access of the state administration authorities for citizens, the quality of the methodical addressing by the offices, as well as the compliance with relevant laws, European directives and international conventions by individual state administration authorities.

## Who provides the information?

The public may request information on the state of the environment from so-called **obligated persons**. It is the public authorities, which include:

- administrative offices and other organizational units of the state and authorities of territorial self-governing units
- legal or natural persons exercising responsibilities related to the environment
- legal persons established, addressed, managed or authorized by the first two, as well as natural persons authorized by those entities.

According to the decision of the Supreme Administrative Court, the information can also be requested from the **President of the Czech Republic** or from the organizations established by the self-governing units – the judgment was specifically about the **Prague Transport Company** operating public transport in the capital city.



**About the nuclear energy without the public.** The aim of the new legislation is to prevent public from participating in the Nuclear Law procedure. This may, in particular, affect the authorization of new nuclear blocks, the extension of the operation of nuclear power plants and the construction of a deep underground dump of nuclear waste – which are the current causes of a massive disagreement among the inhabitants of the affected municipalities (for more information, see p. 22).

Photo: Greenpeace CZ

## ČEZ as an obliged entity?

In June 2017<sup>2</sup>, the Constitutional Court dealt with the question of whether ČEZ (the largest state-owned electricity producer in the Czech Republic) belongs among the entities obliged to provide information. In the past, the Supreme Administrative Court has repeatedly ruled that ČEZ is a public institution, which, in relation to providing information under Act No. 106/1999 Coll., on free access to information, meant that it should be obliged to provide information about its activities.

However, the Constitutional Court has ruled that the obligation to provide information pursuant to the aforementioned Act **does not apply** to ČEZ. The main reason for this decision is the fact, according to the court, that the purpose of ČEZ's existence is primarily the **profit-making activities of its shareholders**. The disclosure of internal data would, in the court's view, **threaten the business interests of the company** and gain its competitors an advantage. The Constitutional Court has thus come to the conclusion that **trade secrets take precedence over the right to free access to information**.

<sup>2</sup> Processed on the basis of a verdict of the Constitutional Court dated 18.7.2017, file no. IV ÚS 1146/16 – [www.nalus.usoud.cz](http://www.nalus.usoud.cz)



***A highway under the landslide.*** One of the biggest conflicts between civic associations and the state – the D8 highway – has been going on since the mid-1990s. The courts have repeatedly confirmed that unlawful acts were committed when the building crossing the Central Bohemian Uplands was authorized. In 2013, the activists have just given the truth by nature itself: The completed highway was drowned by a massive landslide.

*Photo: Wikicommons*

## **II. Public participation**

### **In general**

The second pillar of the Aarhus Convention, which logically follows the first pillar of access to information, deals with the issue of public participation. It is precisely the public, especially the so-called concerned public, which, according to the Aarhus Convention should be guaranteed the right to engage in environmental decision-making, thereby contributing to greater transparency in the proceedings, ensuring public control and, consequently, increasing the quality of the received decisions in areas with a potential negative impact on the environment.

# The Aarhus Convention Compliance Committee and the European Commission

The Aarhus Convention Compliance Committee oversees compliance by the Member States with the implementation of the Convention. The Czech Republic was criticized by the Committee in 2012 (Decision ACCC/C/2010/50) for non-compliance with the obligations under Articles 3, Paragraph 1, 6, Paragraph 3 and 9, Paragraph 2, 3 and 4 of the Convention. Access to legal protection concerned the following deficiencies:

	Has the EIA amendment of 2015 addressed this complaint?	Has the amendment to the Building Act of 2017 addressed this complaint?
There is no <b>clear, transparent and consistent legal protection</b> framework	No	No
The interpretation of the <b>public concerned</b> is too <b>restrictive</b>	No (a mere definition of the public concerned, new rights granted only to its parts)	No
Deficiencies in the interpretation of <b>active prosecution legitimacy</b> The rights of the public concerned, which had no right to participate in the administrative procedure and whose right were still affected (such as lessees), were also actively legitimized, as were non-governmental associations	No	No
The restriction of <b>environmental associations</b> in the context of the <b>substantive review</b> of the decision (the Court's interpretation of the law confers on the associations the exclusive right to claim their procedural rights, not material rights)	Yes	It does not change the state
Unreliability of the conclusion of the <b>EIA inquiry procedure</b>	Yes	It does not change the state
The impossibility of reviewing the inactivity of the administrative authority by a court	No	No
Beyond the frame of the complaints	Basic restrictions on the number of projects considered in the EIA	Exclusion of associations from proceedings related to environmental protection, but the conclusion does not reach the EIA assessment limits

## Where is the right to public participation enshrined?

The legal regulation of public participation in the Czech Republic is characterized by **the lack of clarity and fragmentation** of individual legal norms into an entire range of specific legal regulations. This ultimately leads to difficult orientation, lack of clarity, and interpretative issues. This circumstance can be assessed particularly negatively as the addressees of these legal norms are the public who, in fact, has no effective legal involvement in environmental decision-making or professional support for non-governmental non-profit organizations (NGOs) dealing with environmental protection. It results that under the current legal status, the activity of NGOs for environmental protection is absolutely crucial and difficult to substitute.

The most important legal regulations can be called Act No. 500/2004 Coll. on the Administrative Procedure Code, as amended, which contains the general conduct on the procedure of law, including the rules of participation, i.e. the definition of the persons who are parties to the proceedings and which, by virtue of this, belong to the entire complex of authorizations, which can effectively influence both the proceeding itself, as well as its outcome. The provision of Section 27 defines several definitions of participation. The first definition stipulates that the participants are an **applicant** (for example an applicant for an exemption from prohibitions for the protection of a specially protected area or an investor in future construction) and **other affected persons** who for the community rights or obligations with applicant must **apply for a decision** from the administrative authority. They are therefore persons subject to a decision by an administrative authority. The administrative code also contains a further definition of the participants and states that the participants are also **other persons** on whom it is decided to **establish, change or cancel the rights** or obligations or declare that they have or do not have the right or obligation. This definition of participation applies to proceedings initiated by the **official authority**, for example, in proceedings for an administrative fine for breach of obligations under some of the constituent regulations.

Another legal definition then applies to **other affected persons** who may be directly affected by a decision on their rights and obligations. In this case, for example, the **owners of neighboring plots** in the process of permitting construction. The last legal definition applies to persons who designate a **special law** for participants.

If the law provides for a modification for the circle of participants, the administrative code will not apply (for example, participants in territorial and construction procedures under the Building Act, participants in the EIA process according to the Environmental Impact Assessment Act or the basis of the Atomic Act). In the field of environmental protection, the public concerned does not traditionally participate in proceedings under the administrative code because its participation is governed by specific regulations.

Into this group of special legal regulations we can, for example, include the following laws: Act No. 183/2006 Coll., the Building Act, as amended, which is a basic legal regulation for the management of the placement and authorization of building plans, Act No. 100/2001 on Environmental Impact Assessment, as amended, which follows and implements the EIA Directive, Act No. 76/2002 Coll., on Integrated Prevention, as amended, or Act No. 114/1992 Coll. Protection of Nature and Landscape, as amended, etc.

# Overview of the modification of public participation

	Plan falling under the EIA	Plan not falling under the EIA
Natural persons	Only owners (for example, according to the Building Act)	Only owners (for example, according to the Building Act)
Legal Entities	NGOs meeting the conditions according to the EIA law	NGOs cannot, except for minor exceptions, participate (by 2017 they could participate on the basis of the Nature and Landscape Protection Act)

## Who can participate?

In the general context, we can distinguish two basic forms of participation, i.e. participation consultative and full participation, in the context of the legal code of the Czech Republic. Consultative participation is significantly restricted, as opposed to full participation, in the extent of the rights granted to the authorized persons and consequently also in the possibility of proceedings, in any significant way.

Consultative participation is mainly regulated within environmental impact assessment or in the preparation of land-use plans, where everyone can make comments. In this type of participation, however, the public is not authorized to seek an administrative or judicial review.

The right to participate in the procedure (full participation) is basically a matter for the persons directly concerned by the proceedings. Typically, these are either natural persons (for example, neighbors in giving building permission) on the one hand, or legal entities on the other. In particular, legal entities in the form of environmental NGOs fulfill the already mentioned irreplaceable role due to their specialization on the given issue, expertise and experience in environmental protection, thus effectively contributing to public control in this area, in addition mobilizing civil society in protecting the environment and often providing advice to affected property owners, neighbors or even municipalities. This is also reflected in the Aarhus Convention, which explicitly mentions NGOs dealing with environmental protection as the so-called public concerned.

Within the legal code of the Czech Republic **the public concerned** is newly defined from the year 2015 (Amendment of the EIA Act) in the Provisions of Section 3, Letter i) of Act No. 100/2001 Coll., on the assessment of the effects on the environment, as amended:

### the public concerned (means)

1. a person whose rights or obligations may be affected by a decision issued in a follow-up procedure (*in an EIA process*)
2. a legal entity of private law, whose subject activity is the protection of the environment or of public health according to a founding act and whose main activity is not an enterprise or other profit-making activity occurring at least 3 years prior to the date of publishing the information on the subsequent proceedings according to Section 9b, Paragraph 1, or before the date



**People have prevented garnets from being extracted.** After many years of efforts, the inhabitants of the villages of Podkrkonoší saved semi-precious stones – Czech garnets from the surface mining. It was to be quarried both on the meadows and directly within some of the villages of the Podrovenško part and in the troughs of the foothills. Under the new legislation, people could not participate in administrative proceedings at all.

*Photo: Civic Association Pod Rovněmi*

of the decision according to Article 7, Paragraph 6, or supported by at least the signatures of 200 people.

Compared to the definition of the public concerned in the Aarhus Convention (“the public who is – or can be – influenced by environmental decision-making, or who has a certain interest in this decision”), it is defined in Act No. 100/2001 Coll. on the limited application of scope and cannot be related to proceedings unrelated to proceedings on environmental impact assessment or do not follow them. Moreover in the first part of the definition, the public concerned is defined (a person who may be affected by a decision given in a subsequent procedure affecting their rights or obligations) as one not entitled to any rights under the law. All authorizations according to EIA law are thus granted only to NGOs.

## **Is the understanding of the public concerned in the Czech Republic in accordance with the Aarhus Convention?**

The definition of the circle of the so-called public concerned, the rights granted to it in relation to participation in environmental decision-making and the subsequent possibilities for judicial protection is the target of long-standing criticism. Legal practice in the Czech Republic, in the long run and contrary to the Aarhus Convention, adopts a restrictive interpretation in relation to the extent of the potentially affected rights of the public.

This is mainly the legal regulation contained in the Building Act. The Building Act includes property rights and other rights of a material nature. As a result, persons of a different legal status, especially from the owners of neighboring properties (such as lessees), are excluded from participating in the proceedings. This legal situation is contrary to the Aarhus Convention and has already been qualified as non-compliant by the Aarhus Convention Compliance Committee, which explicitly states that other property rights, social rights or the right to a favorable environment must also be classified among the rights in question.

### **According to the Compliance Committee is a lessee a person falling within the definition of the so-called public concerned?**

A lessee is a person who holds or uses land, house/apartment/office, etc. owned by another person, usually for a sum of money (lease). The intent can affect the lessee's social and environmental rights, especially if the lease relationship lasts for a longer period of time. In such a case, the lessee's interests may, to some degree, be close to the interests of the owners. Although the lessee's relationship to the lease subject is always mediated, the lessee may be affected, even short-term, by the proposed intent, and hence the lessee should generally be considered part of the public concerned in accordance with Article 2, Paragraph 5 of the Convention and should therefore enjoy the same rights like other people from the public concerned (see the Conclusions and Recommendations in Case ACCC/C/2010/50 of 29.6.2012<sup>3</sup>, the Aarhus Convention Compliance Committee). In spite of the aforementioned Czech legislation in the Building Act, it consistently denies lessees the right to take part in proceedings along with other persons not affected by the ownership right.

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<sup>3</sup> The details of the case are available on the website of the Aarhus Convention:  
<https://www.unece.org/env/pp/compliance/Compliancecommittee/50TableCz.html>.

# In what areas of environmental decision-making does the public have the right to participate?

Following the system of the Aarhus Convention, we can further outline the area of public participation in the following areas:

- (i) permitting activities (Article 6).
- (ii) plans, policies and concepts (Article 7).
- (iii) provisions (Article 8).

## 1. Specific activities

Environmental decision-making on specific activities is the most common areas in which you can exercise the rights guaranteed by the Aarhus Convention. These are decisions on specific activities that may have an impact on the environment as defined in Appendix 1 to the Aarhus Convention, all of which are activities that have a greater impact on the environment, such as the energy sector, the chemical industry or waste management.

Among the **individual authorizations of the public to participate** in proceedings, the following may be mentioned, in particular:

- The right to participate in the mentioned proceedings
- The right to a certain circle of information on the proceedings in a timely manner and in an appropriate form
- The right to a sufficient period to prepare for the individual stages of the proceedings
- The right to participate in the process at the earliest stage when all options and alternatives are open and where public participation can be effective
- The right to submit comments
- The submitted comments dealing in any adopted decision
- The right to information on the final decision with justification
- The right to request an administrative and judicial review of the decision given

However, in individual proceedings, the number of persons authorized to participate in the proceedings varies considerably, and not all authorizations can be used in all types of proceedings having an impact on the environment.

## Public participation in proceedings on plans subject to EIA

**Environmental Impact Assessment (EIA)** is an independent proceeding in the Czech Republic and therefore has its own form of participation. Participation in the EIA process has gained importance, along with the 2015 amendment, which has responded to legitimate complaints from the professional public, the Aarhus Convention Compliance Committee, and in particular the pressure on the part of the

European Union or European Commission. Part of the public concerned pursuant to this Act (legal person governed by private law, the subject of which is the protection of the environment or of public health under the founding act and whose main activity is not business or other profit-making activity performed at least 3 years before the date of publishing the information on the subsequent proceedings according to Section 9b, Paragraph 1, or before the date of the decision according to Article 7, Paragraph 6, or supported by the signatures of at least 200 people) has the right not only to participate actively in the environmental impact assessment process but **also participate** in the subsequent permission proceedings (especially territorial and building proceedings) and effectively influence them. The Environmental Impact Assessment Act stipulates that a participant in the subsequent proceedings shall also become the public concerned, who shall, within 30 days from the date of publishing the information, be notified by written notice. An appeal against a decision given in subsequent proceedings may also be brought by the public concerned, even if it was not a participant in the proceedings in the first instance.

### **Insufficient consideration of the findings of the inquiry proceedings**

Non-governmental organizations point to a frequent practice in which the competent authority transmits requests received from the public to the findings of the inquiry proceedings. However, these requirements are ignored when processing documentation, opinion, and stances. It is sufficient if the documentation processor provides almost any justification for the impossibility of fulfilling these conditions. The Office does not return such documentation in most cases and gives its stance. Thus, the EIA process is to a certain extent formal and discourages the active public from participating in it.

The possibility of the participation of natural persons in the subsequent proceedings represent the definition of participation contained in special laws. For example, e.g. the **Building Act**, as a participant in territorial proceedings, indicates the owners of the land or buildings on which the project is intended to be performed, as well as persons whose ownership or other right to neighboring buildings or land can be **directly affected**. Participants, on the other hand, **are not** the lessees of apartments, non-residential premises or land. Participants may lodge **objections** in the proceedings to be dealt with by the relevant building office, and then may **appeal** against the issued decision. Natural persons defined in this manner can participate in procedures for plans subject to EIA assessment as well as those not subject to such assessment.

It is also possible to highlight the newly introduced aspect of the **binding aspect** of an EIA opinion, which should guarantee the obligation for public administration authorities to take into account the conclusion of the environmental impact assessment in other subsequent proceedings, i.e. take into account the results of public participation. As long as the EIA opinion is not binding (according to previously applicable legislation) and the relevant decision-making authorities in the subsequent proceedings are not mandatory, the EIA's position is not taken into account.

## **Amendments to the Environmental Impact Assessment Act and 2017**

Public participation in the EIA has undergone fundamental changes in connection with the adoption of the amendment to Building Act No. 225/2017 Coll., which brings with it a significant limitation of the public's right to participate in proceedings. For example, some of the most significant are:

- the cancellation of the obligation (newly the only possibility) to convene an oral public hearing, which enabled the public to personally acquaint itself with the assessed plan and immediately express itself, as a result possibly avoiding possible misunderstandings and disputes – this change significantly restricts the right of public participation
- cancellation of the option to impose an option on the investor to process variants of the proceedings – this change deprives the public of the opportunity to comment on the different variants and then choose the most appropriate
- the real limitation of the possibility to participate in the proceedings by shortening the deadlines for submitted comments

However, a binding EIA opinion is mandatory for a very limited number of projects (about 100 projects per year throughout the Czech Republic), presenting a possible significant impact on the environment. An overwhelming majority is a set of proceedings that do not require the obligatory issuance of a binding EIA opinion and do not follow up on the issue of a binding EIA opinion.

## **What are the rights of the public if the plan is not subject to the issuance of an EIA opinion?**

In such a case, there is a significant reduction in the possibility of the public to participate in the proceedings and to effectively influence the results of environmental decision-making. First, the fragmentation of the legal regulation governing the different types of proceedings, with the associated lack of clarity and the difficult orientation in legislation, plays a significant role. Second, in a number of cases, a qualitatively different possibility of public participation or the public concerned can be identified. An example may be proceedings according to the Integrated Prevention Act on the one hand, expressly involving the participation of associations and the Atomic Act or the Public Health Protection Act (in connection with the authorization of so-called noise exemptions allowing the exceeding of statutory noise limits) on the other, excluding the participation of any person other than the applicant and so completely denies the right of the public to participate in such proceedings, in turn also reflected in the right to judicial protection and meets the requirement of Article 9, Paragraph 3 of the Aarhus Convention.

## **The act on nature and landscape protection**

This act has a special status, especially thanks to Section 70, which deals with the participation of citizens. Just about this single paragraph on the public concerned or

NGOs deals with nature and landscape protection, propping up, by the end of 2017, the right to information on intended interventions and initiated proceedings where nature and landscape conservation interests could be affected along with the right to participate in such proceedings. In other words, just this paragraph was a guarantee and a necessary prerequisite for the public in the form of NGOs to participate in the proceedings and thus participate effectively in environmental decision-making.

It is the Act on Nature and Landscape Protection, as well as the Water Act and Integrated Pollution Prevention Act, which guarantees to NGOs and the public concerned the opportunity to take part in environmental decision-making, when there is not a subsequent proceeding for issuing an EIA opinion. Nevertheless, this modest legal regulation was adopted together with the amendment to Act No. 225/2017 Coll. with significant changes for the worse.

## **What are the consequences of adopting an amendment to the Building Act?**

The amendment substantially restricts the application of Section 70 and the rights guaranteed to the public concerned in that respect only to the participation in proceedings according to the Nature and Landscape Protection Act. The amendment effectively cancels out the possibility for NGOs to become involved in proceedings in which nature conservation authorities do not decide and which are plans not subject to environmental impact assessment. NGOs will not, for example, be allowed to take part in the process of deciding to cut trees growing outside the forest or to intervene in a specially protected area if these plans are related to construction. Primarily this will be the territorial and construction proceedings under the Building Act, as well as the procedure for determining mining areas or for permitting mining activities. The consequence is that, in the vast majority of proceedings not followed by subsequent proceedings for issuance of an EIA binding opinion (specifically, for example, even smaller incinerators or industrial plants), environmental NGOs will not be able to participate in the procedure, and ultimately influence final decisions. This change leads to the exclusion of the organized public from participation in environmental decision-making with potentially significant environmental impacts, reducing the possibility of public control and is contrary to the principle of democratic public administration.

This change is completely contrary to the current trends of public participation and contradicts the commitments of the Czech Republic that, in the words of the preamble to the Aarhus Convention, also acknowledged that: “public participation in environmental decision-making enhances the quality of the decision-making and enforcement, contributes to raising public awareness on environmental issues, provides the public with the opportunity to express their concerns and interests as well as enables public authorities to take these concerns and interests properly into account.” The adopted wording of the amendment contradicts this statement and removes the last form of defense, which public participation, through NGOs, can present to citizens for many projects not subject to environmental impact assessments.

## How does public participation differ in the (non) follow-up of an environmental impact assessment?

This distinction is crucial for the possibility and range of public participation in proceedings. In the case of so-called subsequent proceedings to issue a binding EIA opinion, NGOs may take part in the proceedings and exercise the rights of the participant in the proceedings. In the case of non-binding proceedings, i.e. proceedings on plans not subject to an EIA, NGOs cannot participate in minor exceptions.

From the above-mentioned difference in the level of public involvement in environmental decision-making between the two proceedings groups, it is clear that applicants for environmental decisions will make an eminent effort in avoiding environmental impact assessments to avoid possible comments from the public. It can be reasonably assumed that attempts will be made to promote larger plans by the so-called salami-slice strategy, which is to divide one project into more relatively separate parts, thus trying to bypass legal restrictions.

### 2. Plans, programs and policies

Public participation in this area is regulated in Article 7 of the Aarhus Convention, which is characterized by a greater margin of discretion and flexibility in comparison with Article 6 in finding a suitable way of ensuring a transparent and fair legal framework for public participation.

As in the case of public participation in specific activities, environmental impact assessments are also key in this part, in particular the SEA, (*Strategic Environmental Assessment*). Public participation is ensured by means of the right to submit statement and by participation in a public hearing.

A special arrangement is then subject to **land-use planning**, with public participation being secured under the Building Act through two main tools, such as the submission of comments and objections. These tools differ from the circle of authorized persons to their submission and legal significance.

**Comments** can be submitted by anyone to express their opinion on the prepared plan, but the public administration authority is not bound or decide on them. On the other hand, a considerably narrower range of authorized persons is allowed to file **objections** ("qualified comments"). The competent public authority must decide on the objections lodged and justify the decision itself. Such a decision is part of the final plan against which it is possible to defend, among other things, through judicial means and, if necessary, to achieve its change.

The Supreme Administrative Court, in the settlement of the comments in its Verdict No. 4 Ao 5/2010-48 of 15.9.2010, stated that: "From the point of view of the rights of the participant to the proceedings, the comments represent a somewhat weaker instrument of protection in relation to objections on which the authority issuing a measure of a general nature is required to decide. However, according to the opinion of the Supreme Administrative Court, it cannot be deduced that it was possible or perhaps correct to deal with the comments only formally and to deal with them with general phrases, without taking their substance into account."



**Discussion at the stadium.** *The importance of public discussion of environmental impacts of buildings is demonstrated by the planned incinerator of hazardous waste in Pardubice region. The petition against the construction was signed by 45,000 people and interest in the hearing was so great that the authorities had to rent a hockey stadium in 2012. Under the new legislation, the authorities are not obliged to convene the hearing (for more information, see below).*

*Photo: Stop the Incinerator*

**Public discussion** is a very frequent method of involving the public in the field of planning, which can be a valuable tool if it is not only formally conceived, and the public is given enough space to prepare, obtain background and information, and to be able to express their doubts and comments.

## **Concerning the nature and significance of a public discussion**

When discussing the Zonal Development Principles of the South Moravian Region, it was only possible to speak orally to those who submitted written objections or comments. In addition, this performance was only one with a maximum of 3 minutes. After the aforementioned interval, the speaker's microphone was switched off. The oral summary of objections and comments was answered by the attending representatives of the authorities concerned, and their time was not restricted. Persons entitled to object and comment could

not respond to these statements, which contained a number of controversial or directly absurd and untrue statements.

According to jurisprudence<sup>4</sup>, the principle of public discussion consists in the synthesis of informing the public about the measures under preparation and the public's acquaintance with the underlying material, on the one hand, and the mutual interaction of the public and the plan maker, or the authorities concerned, on the other. This dual nature of public discussion corresponds to its two phases. The Supreme Administrative Court of the Czech Republic has deferred to the preference of only one of two phases and emphasized that both of these public discussion phases are equally important and should therefore be given a comparable time span. The term itself: "discussion", in terms of semantics, determines that the content of such negotiations should not be exclusively a monologue by the planner, or the processor of the territorial planning documentation, but only a mutual dialogue between these entities and the authorities concerned on the one hand, and the public on the other.

The presence of the public in a public hearing forces the planner or processor of territorial planning documentation, explain and justify the development directions of the region; thus encouraging a contradictory debate and free exchange of views and opinions in order to seek broader consensus and, if necessary, remedy the deficiencies of the proposed measure in a general nature. The public has been deprived of its rights if it has not been given sufficient time when the effort to meet the set time limit does not imply great affability and willingness for dialogue.

The possibility of initiating judicial review is limited to binding plans, programs and policies. In the field of environmental protection, it is most often the territorial plans of municipalities and regions. However, these documents may again be discussed by only by a limited number of persons: the owner of the land in question, the public representative (authorized by a determined number of citizens to comment on a part of the territorial plan) or NGOs. The deadline for submitting a relevant proposal for the repeal of a measure of a general nature or a part of it will be reduced with the effect of the amendment to the Building Act from the current 3 years to just one year.

*Following the jurisprudence of the Supreme Administrative Court of the Czech Republic <sup>5</sup>, in the case of the so-called **incidental review of measures of a general nature**, (i.e., for example, together with an administrative action) can be terminated by the measures of a general nature even after the expiry of the 3-year period. This relatively new approach of the Supreme Administrative Court of the Czech Republic on the possibility of reviewing measures of a general nature can be evaluated positively. The incidental review of a measure of a general nature can serve as the last tool to eliminate an unsustainable situation where a manifestly unlawful measure of a general nature (such as a territorial plan) could continue to interfere with the rights and legitimate*

<sup>4</sup> See the judgment of the Supreme Administrative Court, No. 1 Ao 7/2011-526, dated 21.6.2012

<sup>5</sup> See the judgment of the Supreme Administrative Court, No. 5 As 194/2014-36, dated 13.9.2016

*interests of the public but which, given the expiry of the time limit (newly one year) to eliminate the proposal for the annulment of measures of a general nature, the court is not able to remove. Amendments to the law adopted in the context of the amendment to the Building Act would not affect the a newly-judged incidental review of measures of a general nature.*

### 3. Regulations

The adoption of generally binding legislation is the domain of representative bodies representing the will of the public, whether it is a public for the entire republic (the Czech Parliament), the regional (regional councils) or the local level (municipal councils). However, not all legislation in the Czech Republic is accepted only by representative bodies; such a group may include government regulations, ministerial decrees, or regulations from municipalities and regions. Although it is “only” about so-called subordinate legislation that can just be issued within the limits of (constitutional) laws and their implementation, they may have far-reaching negative environmental impacts. Public participation in their approval is often not ensured – an example can be Government Order No. 272/2011 Coll., on health protection against the adverse effects of noise and vibrations. This regulation specifies the specific noise limits to be observed, for example, when operating a motorway or an airport. Restrictions have been repeatedly eased in the past (thus providing less protection for human health), despite public protests that have never been involved in any discussion.

However, it should be emphasized that the adoption of legislation (the so-called legislative process) is different from their preparation, which Article 8 of the Aarhus Convention has particularly in mind when it mentions the obligation to strive for the effective public participation at an appropriate stage where options are still open. The Aarhus Convention governs the three basic prerequisites for achieving this objective:

- determination of an adequate time frame for effective participation,
- publication or other disclosure of draft regulations,
- the right of the public to comment on the drafts of such regulations, whether it is about making comments directly or through representative advisory bodies.

However, the subject article of the Convention, due to overly vague wording, provides a great deal of room for consideration by the parties to the Convention and is least specific in all of its provisions on public participation. However, this fact does not change the fact that the participants have the obligation to take appropriate measures and fulfill the objectives of the Aarhus Convention.

At the **legal level**, there is a considerable difference between the adoption of government draft laws and non-governmental draft laws. Government draft laws are the most common type of drafting and are prepared in accordance with the Government’s Legislative Rules, which regulate the adjustment of laws in a relatively detailed manner and provide sufficient room for the discussion of all participants involved, the clarification of inconsistencies and the seeking of compromise solutions. There are also rules on the disclosure of draft legislation, including the

possibility for the public to submit comments that have to be at least generally evaluated (so-called public comment procedure). The situation is quite different in the case of non-governmental, especially parliamentary draft laws or parliamentary amendments. In such a case, the scope for public discussion or the consideration of all alternatives and impacts of proposals is minimal, which can have serious impacts on the environment or public participation in general.

*The current example is the adoption of the abovementioned amendment to the Building Act, which, on the basis of a parliamentary amendment without compensation, canceled the possibility of the participation of environmental NGOs in procedures where nature conservation bodies do not decide and in proceedings not subject to an environmental impact assessment. This amendment proposal, which severely restricts the rights of NGOs and can have far-reaching negative consequences for the environment, was adopted on the proposal of only two parliamentary members and without any guarantee of public participation, which, moreover, did not have enough scope to rebut erroneous assertions upon which the adoption of this amendment depended on.*

*An argument for limiting the rights of NGOs was, among other things, the claim that NGOs delay relevant proceedings and only postpone final decisions. However, the fact is that the arguments of NGOs are often justified and lead, in the case of modification procedures, to the cancellation of contested decisions. However, this is not an obstruction, but rather a consequence of adopting legally defective decisions. If the acceleration of the procedure is likely to be accelerated after the amendment, it will not be due to better work by the relevant public authorities or better legislation, but will be due to unrevealed unlawful or substantively incorrect decisions that may have far-reaching negative consequences for the environment.*



**People can sue the industry.** *Activists on the chimney of one of the largest coal-fired power plants in the Czech Republic – Prunéřov. Thanks to the Aarhus Convention, civic societies in 2015 at the Supreme Administrative Court demanded the right to sue the substance of the permit to operate industrial plants, which the Czech courts had previously rejected (for more information, see p. 32).*

*Photo: Greenpeace CZ*

### III. Access to legal protection

Access to legal protection is intended to ensure the enforceability of the Aarhus Convention standards and national environmental legislation. In addition, it helps to create equal conditions for the public and to strengthen the implementation and compliance of the Convention by the parties. The third pillar judicial review of the Aarhus Convention can be divided into three categories, namely:

- access to a judicial review of the procedure for **requesting information**,
- access to a judicial review of decisions in which the Aarhus Convention requires **public participation**,
- access to administrative or judicial proceedings to challenge violations of environmental law in **general**.

Below we analyze access to legal protection when requesting information and breaching the right to a favorable environment in general. The remainder of the chapter will be devoted to court protection in public participation.

Access to legal protection in connection with the request for information is generally unproblematic. A judicial review should be made available to any person who has **requested information** if they consider that their request for information has been ignored, wrongly rejected or incorrectly answered or has not been dealt with in accordance with law. The judicial code for administrative procedure provides for a judicial review in this area in two ways, namely in proceedings against the decision of an administrative authority or in proceedings for the protection of the inaction of an administrative authority.

Access to judicial protection in the face of a **general violation of environmental law pursuant to of Article 9, Paragraph 3** of the Aarhus Convention is still very problematic. In general, the public may claim protection of the environment before the courts only if it has been affected by its **subjective right** and has been a participant in the previous proceedings. There are only very narrow exceptions to this restriction. One of them is a trial operation (in this case the long-term use of the motorway – Road Circuit around Prague – before its approval as a permanent permit for operation). The permit procedure for the trial operation does not have any participants in the Czech Republic, with the exception of the builder. The Supreme Administrative Court in this case has inferred that the public concerned is entitled to seek a judicial review.<sup>6</sup>

## **Access to a judicial review of decisions in which the Aarhus Convention requires public participation (Art. 9, Paragraph 2)**

On the other hand, access to a judicial review of the decision has until recently been considered a very problematic place to implement the Aarhus Convention due to a combination of the number of subjects authorized for the action, the extent of the judicial review they may require and the ineffectiveness of the judicial review (long court decision, in combination with the non-recognition of the suspensory effect of the contested decisions).

Only those persons who participated in the previous administrative proceedings could file the action. The right to a favorable environment was granted **only to natural persons**, so environmental NGOs could not object to the factual illegality of the decision. The last major deficiency was the **impossibility** for the public to seek judicial protection against the **inaction of the administrative authority**, since the court did not have the possibility of ordering the administrative authority to act (unless the administrative authority itself initiated the proceedings, for example, the removal of an unauthorized building).

## **The right of natural persons to access the courts**

As noted above, the access of individuals to courts is limited to demonstrating that their subjective right is affected. Natural persons may then **file an action against the decision of the administrative authority** under the administrative court rules.

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<sup>6</sup> See the judgment of the Supreme Administrative Court, No. 4 As 157/2013, dated 18.4.2014

A condition of active prosecution legitimacy is the fact that the decision has limited the applicant's rights, thus a person concerned in their rights. A participant is entitled to file an action for the proceedings before the administrative authority if their legal access to this authority has been restricted.

In practice, the restriction of the legitimacy of natural persons concerning their concerned interest may be as follows: If a homeowner who is not satisfied with a permit allowing the construction of a chemical building on the neighboring plot and claims that their property right has been restricted by this building, the court will only deal with the aspects of the restriction of their property rights. If the complaint includes a point on the possibility of pollution of a nearby river, a protected animal or air quality throughout the region, the court will not deal with these points.

The access of natural persons – notably property owners – to judicial protection is insufficient due to the restriction of their participation in subsequent EIA procedures. Citizens who are not owners of the property in question have no opportunity to seek judicial protection of their rights. These people are also severely restricted in defending their procedural rights as they are not allowed to enforce their procedural rights – such as the right to the settlement of comments.

Another option is an action against the **inactivity of the administrative authority**. A natural person can then file an application for a decision or a certificate with the administrative authority, and it remains inactive (i.e. the administrative authority has initiated proceedings but does not proceed from there. Administrative action cannot be required for an administrative authority, for example, to initiate proceedings to remove an unauthorized building). However, the law combines this possibility of protection with the condition of the exhaustion of all the means that the procedural regulation (usually the administrative code) confers on protection against inaction.

## **The right of civil associations to access judicial protection**

The active prosecution legitimacy of associations is also evidence in most cases based on the previous participation of associations in proceedings. Ecological associations can participate in these proceedings on the basis of different constituent regulations.

With the amendment to the Building Act, which is described below, unfortunately, the rights of associations to participate in construction proceedings have been severely restricted. Ecological associations have so far been able to participate in territorial and construction proceedings under Section 70 of the Nature and Landscape Protection Act. Newly, this provision will apply (from 1.1.2018) only to proceedings according to the Nature and Landscape Protection Act, **and not proceedings according to the Building Act**. However, this does not exclude the possibility of the participation of associations in land and construction management in the case of projects requiring environmental impact assessment under EIA law. The exclusion of associations from participating in the construction proceedings does not affect their active prosecution legitimacy under EIA law.

In the past, the position of the associations before the courts has been relatively restricted by the so-called **doctrine of alleged interference with rights**. On the ba-

sis of the interpretation of the courts at that time, the associations could claim only defense against interference with procedural rights. However, this legal opinion has already been overcome and associations can claim both the defense of procedural and material rights.

## **Even civic associations may request a substantive review of the decision**

In 2008, the Supreme Administrative Court dealt with the active legitimation of civil associations in relation to objections of **substantive nature**. Frank Bold Society civic association requested an interpretation of national legislation in line with the obligations of the Czech Republic (Article 9, Paragraph 4 of the Aarhus Convention, Article 11 of the EIA Directive), which show that associations have the possibility to challenge **all the contradictions** of the contested **decisions with the material and procedural right**. Frank Bold also referred to the findings of the Constitutional Court, which show that, in the case of a double interpretation of the law, it is necessary to choose an interpretation that **provides protection to the complainant's interests**. In relation to the Aarhus Convention, the association refers to the Constitutional Court's judgment of 17.3.2009 (IV. ÚS 2239/07), which implies that, in the case of multiple interpretations, the one that fulfills the requirements of the Aarhus Convention is preferred.

The Supreme Administrative Court based its decision on Article 35, Paragraph 1 of the Charter of Fundamental Rights and Freedoms and subsequent Article 36, Paragraph of the Charter, i.e. on the right to a **favorable environment** and the right to a **fair process**, and also on the provisions of the Civil Procedure Code. The Supreme Administrative Court found that Frank Bold was a participant in the integrated permit procedure resulting in the decision of the two administrative authorities and therefore has the right to raise procedural legal objections, as the Supreme Court has repeatedly judged in the past.

Regarding the possibility of raising substantive objections, the Supreme Administrative Court refers to the text of the Aarhus Convention. The Court notes that although the Convention does not impose specific rights and obligations and is therefore not directly applicable and has no direct effect, it must be used as an **interpretative source** and the national provision must therefore be interpreted in accordance with its wording, namely Article 2, Paragraph 5 and Article 9, Paragraph 2 and which provides that the Member States are obliged to ensure that persons of sufficient interest from the public concerned are able to obtain a review of the substantive and procedural legality of any decision.

The Supreme Administrative Court thus assessed whether the complainant had sufficient interest in the case, thus whether there had been **an interference with their material rights**. The Court referred to its decision of July 2009 and the case of the Constitutional Court of May 2014. Both decisions find a **local element as a decisive criterion**. Following this fact, the court assessed whether the complainant based in Brno, but operating within the whole of the

Czech Republic, could be affected by a decision in their substantive sphere.

The Court found that although the interest in question is located in the Ústí nad Labem Region, the operation of the plant is of such importance that it exceeds the boundaries of the entire Czech Republic. The Supreme Administrative Court then refers to its judgment of September 2014, where it found that the main criterion for affirming the active neverending legitimacy of the association is the existence of a sufficiently strong relationship between the complainant and the territory.

In the given case the Supreme Administrative Court has inferred that the intention has influence on the entire territory of the Czech Republic and thus it is possible to derive a concern in the substantive sphere of the complainant, who develops activity within the whole of the Czech Republic or, in this case, the criterion of a sufficiently strong relationship between the complainant to the territory.

The Supreme Court emphasized the **need to restrict the active legitimacy of the associations** founded for the purpose of nature and landscape conservation, with reference to the fact that if their legitimacy is not restricted, the associations located outside the territory of the Czech Republic could object. Therefore, the restriction given by the location is considered to be a barrier.

The Supreme Court has concluded that if the association has a sufficient relationship with a **given location, the interest may interfere with its substantive sphere**, and therefore it has both procedural and substantive objections.

*Processed on the basis of the judgment of the Supreme Administrative Court of 25.6.2015, No. 1 As 13/2015-295.*

## The regime of the Environmental Impact Assessment Act

The Environmental Impact Assessment Act confers on environmental associations relatively extensive possibilities of seeking redress before the courts. Apart from the fact that civil associations can participate in the investigation and subsequent proceedings and can thus object, the law allows them to file an action. This right is granted to environmental associations operating for at least **3 years, or to associations with the support of at least 200 people**. They may bring the said action against the negative conclusion of an inquiry procedure or against the decision given in an adjudication procedure, for example, territorial or construction proceedings.

Environmental associations **do not have to prove** their subjective right, and yet it is possible for a court to review the decision in **both material and procedural terms**. The act constructs a fiction that an environmental association has rights that can be restricted by a decision issued in a subsequent procedure.

Associations may also use actions to protect the public interest even if the case is returned to the authority which decides in the adjudication procedure, by virtue of the law, **also becoming participants in the proceedings**.

# The right of associations to a favorable environment

In Czech judicial practice there was a long-standing disunity in connection with the recognition of the right of associations to claim the right to a favorable environment with judicial authorities. The right to a favorable environment is guaranteed by **Article 35, Paragraph 1 of the Charter of Fundamental Rights and Freedoms**.

In 1998 the Constitutional Court decided (Resolution I ÚS 282/97 of 6.1.1998) that the right to a favorable environment is **only for natural persons**.

This opinion was finally overcome by the finding of the Constitutional Court No. I ÚS 59/14, which found violation of the right to the judicial protection of the environmental association guaranteed by the right to a fair trial, namely the right to claim their rights at an independent and impartial tribunal. The environmental association appealed before the general courts to abolish measures of a general nature – the territorial planning of a municipality. However, it was not successful at neither the Regional or Supreme Administrative Court. The Supreme Administrative Court, in its rejection, stated that the Aarhus Convention does not allow the association entitlement to file an action for the annulment of a measure of a general nature and also pointed out that the Aarhus Convention does not impose specific rights and obligations and is therefore not directly applicable, as a result having no direct effect.

The Constitutional Court stated that it did not deny that the Aarhus Convention had no direct effect, but pointed out its application to the law and emphasized that if national standards can be interpreted in several possible ways, the interpretation meeting the requirements of the Aarhus Convention is preferred. The Court further argued that, although borderless associations cannot be actively legitimate, the denial of access to a judicial review of measures of a general nature by environmental associations is inadmissible.

As a key criterion the Constitutional Court stated the association's relationship to the locality regulated by the territorial plan or the focus of the association with local justification, for example the protection of certain species of animals in the given territory. In addition, the Constitutional Court stated that, although it must be a so-called established or ad hoc association, a secondary criterion, so that the main activity of the association is the protection of nature and landscape, is not necessary. The presumption of a restriction in rights by a measure of a general nature is sufficient for active legitimation.

In conclusion, the Constitutional Court stated that civil associations are a significant and highly democratic element of civil society and are therefore legitimate and legal in order to be able to participate in proceedings on the proposal for the abolition of the territorial plan for the common interests of citizens for whom it is considered justified.

For the conclusions of the Constitutional Court, it was crucial that the association's right was restricted in regards to the given measure. According to the Court, the term "the restricting of rights" cannot be interpreted as restrictively, as the courts did in general. According to the Court's considerations, the rights of the community may be affected more widely than by interference with the rights of neighboring owners. The defects of the territorial plan may make it more difficult to fulfill



**Park or supermarket?** *The inhabitants of Skuteč in Pardubice region managed to save the park before building a supermarket. The Court has asserted them that the private interest in commercial construction is not more important than the public interest in preserving the greenery. The new legislation has the effect of preventing people from taking part in tree falling procedures (for more information, see p. 23).*

*Photo: Civic Association Skuteč*

the intended concept and thus endanger the social function of the territorial plan.

All the above considerations led to the fact that a violation of the right of a civil association to a fair trial or access to court has in fact been committed and the civil association has the right to request the cancellation of the territorial plan. The Constitutional Court also emphasized that similar cases need to be dealt with reasonably and comprehensively to consider and assess whether an entity is entitled to participate in the procedure for the annulment of measures of a general nature.

## **The Aarhus Convention and the authorization of nuclear facilities**

The specific arrangement in the Aarhus Convention area relates to nuclear installations, whether nuclear power plants or permanent nuclear waste disposal sites.

1. The latest amendment to the Act on Environmental Impact Assessment

lists the so-called subsequent proceedings, i.e. the proceedings, which will be attended by the public and thus will have access to judicial protection. Proceedings pursuant to the Atomic Act in this enumeration are missing. For example, the public will not participate in the management of the construction of a new nuclear power plant and in addition, the Office will not be bound by the terms of the EIA's opinion.

2. In the extension of the operation of nuclear power plants after the projected period (namely the Dukovany power station) there is no EIA. This is therefore a non-public process without the possibility of judicial protection, although the extension of the operation takes place after 30 years of operation and there have been changes in the territory, technological knowledge, etc.
3. In the Czech Republic, there has been no decision on a specific site for the construction of a deep repository of radioactive waste for its permanent storage. Municipalities have long been demanding that they, according to the foreign model, have the inalienable right to disagree with the construction in their territory and thus become equivalent partners of the state. Although they have repeatedly been promised this right at certain times, it has never been transposed into law.



**Skyscrapers above Prague.** *The inhabitants of Pankrác have for years questioned the construction of other skyscrapers on the horizon of the historic city. In addition, transport capacities are exhausted; air pollution and noise exceed legal standards. The new legislation aims to prevent people from participating in land and construction proceedings on these types of buildings.*

*Photo: Wikicommons*

## Conclusions

Public access to environmental information is, in the long run, the least problematic part of a legal regulation that does not make fundamental changes. Public administrative authorities are providing more and more information to the public themselves and actively, using the form of open data or user-friendly electronic applications. When requesting information, the public has been facing two types of problems in the long-term. The first is when the public administrative authority does not have the information it should have. The second problem is when public administrative authorities do not want to provide information (mostly politically sensitive data). In both cases, there is protection, but it is rather lengthy, so the information becomes obsolete and loses its worth.

Public participation in environmental proceedings has been modified in the Czech Republic in the long-term, problematic but stable. Legislation until the end of 2017, beyond the requirements of the Aarhus Convention, allowed the participation of NGOs in all environmental proceedings (even the slightest; NGOs could therefore

participate, for example, in all land and construction procedures in which trees were cut down). In 2015, based on the requirements of the European Union to send NGO's rights in proceedings relating to plans under Environmental Impact Assessment (EIA) were performed. But this amendment also significantly limited the scope of the plans under consideration (by increasing the limits for the construction of residential and office buildings in cities or business centers). In 2017, the provision that had allowed NGOs to take part in environmental proceedings since 1992 was abolished. NGOs will thus not be able to participate in proceedings for plans not considered in the EIA process. Only the owners of the property in question can participate in these proceedings (lessees have never been able to participate in proceedings and this will not change in any way). Public participation in the preparation of plans, programs and regulations remains unchanged.

In the Czech Republic, access to judicial protection has until recently been considered a very problematic place to implement the Aarhus Convention due to a combination of the number of entities eligible to file, the extent of the judicial review they may require and the ineffectiveness of the judicial review (long period of court adjudication in combination with the non-recognition of the suspensory effect to the contested decision). Only those persons who participated in the previous administrative proceedings could file the action. The right to a favorable environment was granted only to natural persons, so environmental NGOs could not object to the factual illegality of the decision. As a result of the amendments described in this report, there has been a narrowing of the procedure in which NGOs have active prosecution legitimacy for submitted prosecution (as a consequence of narrowing the scope of the proceedings in which they may participate). At the same time, the jurisprudence of the Supreme Courts and the amendment to the EIA Act have granted the right to request a substantive review of contested decisions. The access of individuals to judicial protection has so far been limited to owners.



# About us



## Arnika – Citizens Support Centre

Established in 2001, the non-governmental organization Arnika has many years of experience promoting information openness, supporting public participation in decision-making, and enforcing environmental justice. Its experts assist various civil society organizations, municipalities, and individuals in solving cases related to environmental pollution and its prevention throughout the Czech Republic. Arnika also participates in international projects focused on environmental protection and strengthening the implementation of the Aarhus Convention in Central and Eastern Europe, Caucasus, and Central Asia. Arnika is a member of the Green Circle – an association of ecological non-governmental organizations of the Czech Republic, European Environmental Bureau, and ECO Forum.

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## Green Circle



Green Circle is the association of 28 Czech non-governmental, non-profit environmental organizations. It was created in November 1989 and since 2002 has provided organizational background for the industry platform of environmental, non-governmental, non-profit organizations. It includes 77 other organizations in addition to its members. Green Circle works closely with its member organizations, providing them with media and legislative services. Green Circle has long been devoted to them of public benefits, organizing the Ecofestival and mediating the nomination of non-profit organizations into advisory bodies. Green Circle works with the Climate Coalition and the Czech Platform Against Poverty. It is the European Environmental Bureau member.

For more information: <http://zelenykruh.cz>



ISBN: 978-80-87651-37-7

